

# 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 toward 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.

We wish to express our gratitude to the William Penn Foundation for their generous support of this project.

Copies of the Benchbook are available on our websites at: [www.womenslawproject.org](http://www.womenslawproject.org) and [www.advokid.org](http://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. Cons. Stat. A. § 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. Cons. Stat. Ann. § 6102 (a).

The Act defines the term “family or household members” as “Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.” *Id.* Courts interpret this definition broadly in light of the Act’s purpose to protect from abuse and prevent its recurrence. *Commonwealth v. Walsh*, 2012 PA Super. 9, ¶ 9-11, 36 A.3d 613, 618 (interpreting “related by . . . affinity” to include a man and his live-in girlfriend’s daughter due to the Act’s remedial purpose). Even a dating relationship gives rise to standing under the Act because it reflects the parties’ mutual choice to interact on a personal level. *Evans v. Braun*, 2010 PA Super. 231, ¶ 7-8, 12 A.3d 395, 399 (finding a “sexual or intimate partnership” existed where the plaintiff went on two dates with her coworker, during which time he introduced her to his son and told her he loved her).

Parties need not have immediate or traditional family relationships to acquire standing under the PFA Act. Brothers and sisters-in law have standing to bring a petition under the PFA Act because they are “other persons related by... affinity.” *McCance v. McCance*, 2006 PA Super. 263, ¶ 10, 908 A.2d 905, 910. Likewise, parties with common



descendants have standing to bring a petition under the PFA Act because they are “persons related by consanguinity or affinity.” *Slusser v. Deboer*, 2009 PA Super. 224, ¶¶ 5, 985 A.2d 974, 975 (finding the PFA Act applies to a mother and paternal grandfather because their blood relationship to the child inextricably links them to each other).

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 Mescanti v. Mescanti*, 2008 PA Super 201, ¶¶ 8, 11, 956 A.2d 1017, 1023 (finding husband’s indirect threats to wife that she “better not go to sleep. . . . better not close [her] eyes,” coupled with his conduct in the past of cocking his guns within her earshot sufficient to establish reasonable fear of injury and therefore abuse under the PFA Act); *Karch v. Karch*, 2005 PA Super. 342, ¶ 12, 885 A.2d 535, 539 (affirming grant of PFA order against husband upon evidence showing he made the shape of a gun with his hand, “fired” it against his wife’s forehead with enough force to cause her pain, and stated “there is your future”). *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).

A course of conduct that establishes reasonable fear of injury may include hacking into emails and going through cell phone logs, *Mescanti* 2008 PA Super. at ¶¶ 6,

8-9, 956 A.2d at 1021, 1023, and accessing private email accounts to learn of victim's whereabouts. *In re Marriage of Nadkarni*, 93 Cal. Rptr. 3d 723, 732-34 (Cal. Ct. App. 2009).

Intent of the perpetrator is not relevant when making a "reasonable fear" determination. *Raker v. Raker*, 2004 PA Super. 107, ¶ 9, 847 A.2d 720, 725.

## **2. Standard of Evidence**

When the court conducts an evidentiary hearing to determine whether to issue a final PFA order, it is the plaintiff's burden to show the court by a preponderance of the evidence that the abuse occurred. 23 Pa. Cons. Stat. Ann. § 6107(a); *see* section IV *infra* (detailed discussion of domestic violence evidentiary issues that may be relevant in both PFA and custody proceedings); *see Hood-O'Hara v. Wills*, 2005 PA Super 145, ¶ 12, 873 A.2d 757, 761 ("Nowhere in the Protection from Abuse Act itself, or in the body of case law interpreting it, is there a requirement that a police report be filed or that there be medical evidence of an injury in order to sustain the burden of proof."). 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, 868 A.2d 1264, 1265-66.

## **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. Cons. Stat. Ann. § 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). If a victim of abuse is unable to succeed in serving the petition and order upon the defendant prior to the hearing date, the court is authorized to issue a special order authorizing service by another means, including service by mail. *Id.* However, verbal notice of a PFA provided by police may be sufficient to satisfy due process. *Commw. v. Padilla*, 2005 PA Super. 332, ¶¶ 9-12, 885 A.2d 994, 997-998.

#### **5. Statutory Right to a Hearing**

By Pennsylvania statute, plaintiffs have a right to an evidentiary hearing within ten business days of filing. 23 Pa. Cons. Stat. Ann. § 6107 (a). At this hearing, the plaintiff must prove the allegation of abuse by a preponderance of the evidence. *Id.*; *Drew v. Drew*, 2005 PA Super. 87, 870 A.2d 377 (vacating the lower court’s denial of a

temporary PFA and remanding for further proceedings after the court denied the plaintiff's request for a temporary order and refused to schedule a final hearing, concluding that "there was insufficient indicia of credibility under the circumstances to sustain a finding that a temporary order was necessary, let alone to schedule a final hearing pursuant thereto.").

## 6. 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 plaintiff 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 has been issued by the criminal court.<sup>1</sup>

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. Cons. Stat. Ann. § 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 entireties 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

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<sup>1</sup> 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).

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. Cons. Stat. Ann. § 6108(a)(3).

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

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

**No contact:** 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 firearms, other weapons, ammunition, and any firearm license and prohibit defendant from acquiring or possessing any firearm, other weapon, ammunition, or any firearm license 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).

**Restraint of 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).

## 7. 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. Cons. Stat. Ann. § 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. Cons. Stat. Ann. § 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. Cons. Stat. Ann. §§ 6113 (f), 6113.1; *See Stamus v. Dutcavich*, 2007 PA Super 381, ¶4; 938 A.2d 1098, 1100 (finding the court must hold a contempt hearing within ten days from when police file a complaint of indirect criminal contempt). The purpose of holding someone in criminal contempt is 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. 23 Pa. Cons. Stat. Ann. § 6114(a); *Commw. v. Nelson*, 456 Pa. Super. 349, 354-55, 690 A.2d 728, 731 (Pa. Super. 1997) (holding consent-based protective orders are enforceable by criminal contempt proceedings even where such orders are unaccompanied by admissions of abuse). The Defendant's actions need not amount to physical violence for the court to find contempt. Following are several cases where Pennsylvania courts found defendants' actions sufficient to warrant an imposition of criminal contempt:

*Commw. v. Walsh*, 2012 PA Super. 9, ¶ 16, 36 A.3d 613, 619 (holding defendant's request that a friend tell plaintiff "she'd be fucked" if he saw her justified contempt where the PFA order forbade contact through third parties);

*Commw. v. Brumbaugh*, 2007 PA Super. 226, ¶5, 932 A.2d 108, 110-11 (Pa. Super. 2007) (holding contempt was appropriate after the defendant attended a party with his former girlfriend because the PFA order prohibited having contact with her);

*Commw. v. Snell*, 1999 PA Super. 185, 737 A.2d 1232 (finding respondent guilty of criminal contempt twice, once for attempting to enter plaintiff's home and second time for meeting plaintiff 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).

The defendant does not have the right to a jury trial on a charge of criminal contempt, *Eichenlaub v. Eichenlaub*, 340 Pa. Super. 552, 562, 490 A.2d 918, 923 (1985), but is entitled to counsel. 23 Pa. Cons. Stat. Ann. § 6114(b)(3). A sentence for criminal contempt may include a fine, imprisonment or probation up to six months, and other relief set forth in the Protection from Abuse Act. 23 Pa. Cons. Stat. Ann. § 6114(b)(1). Where more than one violation has occurred, the court may impose a six-month sentence for each violation. *Hill v. Randolph*, 2011 PA Super. 115, ¶ 5-6, ¶ 13, 24 A.3d 866, 869, 871 (upholding two consecutive six-month sentences where defendant violated the PFA order twice, by first entering the victim's home and then physically assaulting her). The fine may not be less than \$300 or more than \$1000. 23 Pa. Cons. Stat. Ann § 6114(b)(1); *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 may not appeal the indirect criminal contempt order until the Court imposes sanctions or imprisonment. *Takosky v. Henning*, 2006 Pa Super. 237, ¶ 14, 906 A.2d 1255, 1258.

A court may not *sua sponte* dismiss a PFA order in an indirect criminal complaint action. *Stamus v. Dutcavich*, 2007 PA Super 381 at ¶¶6; 938 A.2d 1098, 1100-1101. In the absence of a party’s petition to modify, the issue of dismissal is not before the court. *Id.*

## 8. 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. Cons. Stat. Ann. § 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.<sup>2</sup> 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

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<sup>2</sup> 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); Shamita Das Dasgupta, *Towards an Understanding of Women’s Use of Non-Lethal Violence in Intimate Heterosexual Relationships* 5 (2001), available at [http://www.vawnet.org/research/print-document.php?doc\\_id=410&find\\_type=web\\_desc\\_AR](http://www.vawnet.org/research/print-document.php?doc_id=410&find_type=web_desc_AR).

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.”<sup>3</sup> To determine the predominant aggressor, courts are encouraged to consider the larger context, including the following factors:

- 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.<sup>4</sup> 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.”<sup>5</sup>

**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.<sup>6</sup> 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

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<sup>3</sup> *Massachusetts Guidelines for Judicial Practice, Abuse Prevention Proceedings*, Commentary to 6:07.

<sup>4</sup> 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).

<sup>5</sup> Massachusetts Guidelines, *supra* note 3, at 6:07.

<sup>6</sup> Joan Zorza, *What is Wrong With Mutual Orders of Protection?*, 1 DOMESTIC VIOLENCE REP. 127, 131 (2008).

devastating consequences such as loss of custody of children and denial of immigration status.<sup>7</sup>

## **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. Cons. Stat. Ann. § 6108(a)(4). Including such relief in the PFA order provides immediate, short-term protection to the children and impedes abduction and threatening conduct by the perpetrator.<sup>8</sup>

The Protection From Abuse Act was amended in 1994 and 2006 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 plaintiff alleges and the court finds that the abuser has physically abused the children, poses a risk of abuse toward the minor children, has been convicted within the prior two years of violating Pennsylvania's statute against criminal interference with the custody of a child, or poses a risk of violating this statute. *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

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<sup>7</sup> Dasgupta, *supra* note 2, at 7.

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

supervised visitation take place in a secure visitation 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.*

### 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.<sup>9</sup>

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.

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<sup>9</sup> 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).

## 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. Cons. Stat. Ann. § 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 36 months. *Id.* § 6108(d).

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

- 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).

**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. Cons. Stat. Ann. § 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, the protection order 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; *see Lawrence v. Bordner*, 2006 PA Super 246, 907 A.2d 1109 (holding that the PFA court must consider testimony regarding the best interests of the child and modify the pre-existing custody order as necessary).

### III. Custody

#### A. The Custody Statute

The custody statute authorizes the court to determine the extent to which parents, persons acting *in loco parentis*, and grandparents have rights to physical custody of and decision-making on behalf of children. This statute was thoroughly revised by the Pennsylvania General Assembly in 2010, and the amended statute went into effect in January 2011. *See* Apps. F-3 (Custody Act), F-4 (Custody Rules, proposed amendments to which are pending).<sup>10</sup> The revised custody statute applies to any proceeding initiated after January 24, 2011, regardless of when the original custody action was filed. *E.D. v. M.P.*, 2011 PA Super. 238, ¶ 7-10, 33 A.3d 73, 76-77.

#### 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 the majority of the time.
- **Partial** – giving the non-primary custodian the right to take possession of the child away from the primary custodial parent for less than the majority of time.
- **Shared** – giving physical custody to more than one parent or caretaker in such a way that each has significant periods of physical custodial time with the child.
- **Sole** – giving one party exclusive physical control of the child.

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<sup>10</sup> Amendments to the Rules of Civil Procedure Relating to Domestic Relations Matters, 41 Pa.B. 3719 (proposed July 9, 2011) (to be codified at 231 Pa. Code Ch. 1915), *available at* <http://www.pacourts.us/NR/rdonlyres/32866111-66A0-4575-8826-17BC6C58A19C/0/rec112domrel.pdf>.



- **Visitation** – the custody statute no longer uses the term “visitation.” Rather, visitation under the current statute is encompassed by partial, shared, or supervised physical custody. The statute, however, notes that “visitation” is used in other statutory provisions and may be construed under those statutes to mean partial, shared or supervised physical custody. Statutes that utilize “visitation” include the PFA Act, divorce code, criminal code and Uniform Child Custody Jurisdiction and Enforcement Act.<sup>11</sup>

*See* 23 Pa. Cons. Stat. Ann. § 5322.

**Legal Custody:** the legal right to make major decisions on behalf 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 5323 of the Pennsylvania custody statute declares the “best interest of the child” to be the guiding legal standard in custody determinations. 23 Pa. Cons. Stat. Ann. § 5323 (a); *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.” *Sawko v. Sawko*, 425 Pa. Super. 450, 454, 625 A.2d 692, 693 (1993); *Lee v.*

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<sup>11</sup> *See* 23 Pa. Cons. Stat. Ann. § 6105 (stating that, in situations of abuse, the law enforcement should inform victims of their right to go to court to obtain a temporary custody or visitation order) and *Id.* § 6108 (stating the court may award temporary custody or visitation in situations of abuse); *Id.* § 3104 (granting jurisdiction over divorce cases, including custody and visitation rights to children of the marriage); *Id.* § 3105 (stating that, in cases where divorcing parties reach a private agreements, provisions in that agreement pertaining to child support, custody and visitation must be modifiable by the court); *Id.* § 3323 (stating a court-issued divorce decree should contain, where appropriate, provisions disposing of custody and visitation rights); 18 Pa. Cons. Stat. Ann. § 2711 (stating that, in cases of domestic violence, police should notify the victim of her right to go to court to obtain an order granting temporary visitation or custody); 23 Pa. Cons. Stat. Ann. § 5402 (defining “child custody proceeding” as any proceeding in which custody or visitation of a child is at issue for purposes of the UCCJEA).

*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 factors to be considered by the court when determining “best interest,” and **requires weighted consideration to those factors which affect the safety of the child**. All of the factors must be considered by the court when making its custody determination. *J.R.M. v. J.E.A.*, 2011 PA Super. 263, ¶ 10, 33 A.3d 647, 652.

The factors include:

- which party is more likely to encourage and permit frequent and continuing contact between the child and another party;
- the present and past abuse committed by a party or household member, whether a continued risk of harm to the child or another abused party exists, and which party can better provide physical safeguards and supervision for the child;
- the parental duties performed by each party on behalf of the child;
- the need for stability and continuity in the child’s educational, family and community life;
- the availability of extended family;
- the child’s sibling relationships;
- the child’s well-reasoned preference, based on maturity and judgment;
- the attempts of a parent to turn the child against the other parent, except where reasonable safety measures are necessary to protect the child from domestic violence;
- which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child;

- which party is more likely to attend to the child’s daily physical, emotional, developmental, educational and special needs;
- the proximity of the party’s residences;
- each party’s availability to care for the child or ability to make appropriate childcare arrangements;
- the level of conflict between the parties and their willingness and ability to cooperate with one another, excluding efforts to protect the child from abuse by another party as evidence of lack of cooperation;
- the history of drug or alcohol abuse of a party or household member;
- the mental and physical condition of a party or household member;
- any other relevant factor.

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 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.<sup>12</sup>
- 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.

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<sup>12</sup> 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).

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.”<sup>13</sup> All states and the District of Columbia have adopted laws requiring courts to consider domestic violence when fashioning custody awards,<sup>14</sup> and twenty-four states and the District of Columbia have created a rebuttable presumption against giving custody to a perpetrator of domestic violence.<sup>15</sup>

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 violent and abusive behavior of the parents and adults in the child’s household in deciding the best interest of the child. 23 Pa. Cons. Stat. Ann. § 5303(a)(3) *amended by* 23 Pa. Cons. Stat. Ann. § 5328(a)(2). The 2010 amendments to the custody statute retained consideration of abusive behavior as a factor to consider in making custody determinations, and emphasized that safety of the child is to be given weighted consideration with respect to the 16 factors which must be considered in determining the best interests of the child. 23 Pa. Cons. Stat. Ann. § 5328(a)(2). Additionally, the custody statute emphasizes the importance of domestic violence when considering two particular factors by specifically excluding consideration of “attempts of a parent to turn

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<sup>13</sup> 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).

<sup>14</sup> AM. BAR ASSOC. COMM’N ON DOMESTIC VIOLENCE, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (2008). A 2012 WLP internal review of each state’s custody statute affirmed the findings of the ABA study.

<sup>15</sup> *Id.*

the child against the other person in cases of domestic violence where safety measures are necessary to protect the child, 23 Pa. Cons. Stat. Ann. § 5328(a)(8), and precluding a court from interpreting a party's efforts to protect the child from abuse as evidence of unwillingness or inability to cooperate with the other party. 23 Pa. Cons. Stat. Ann. § 5328(a)(13).

## **2. Abusive Conduct Under the Custody Statute**

Abusive behavior is conduct defined as abusive under Pennsylvania's PFA Act. *Id.* § 5322 (a); *see supra* section II.A.1. While the definition of abuse from the PFA Act guides the court's determination as to whether abuse is a factor, 23 Pa. Cons. Stat. Ann. § 5322 (a)(2), *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**

The custody statute explicitly requires courts to consider a party's violence towards others when making custody determinations. 23 Pa. Cons. Stat. Ann. § 5328(a)(2). Under the "best interest" factors, the court must consider:

The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.

23 Pa. Cons. Stat. Ann. § 5328(a)(2)(emphasis added).

The specific inclusion of consideration of risk of harm to an abused party as well as the child affirms past court decisions mandating consideration of violence towards

others. In *Costello v. Costello*, 446 Pa. Super. 371, 666 A.2d 1096 (1995), the Superior Court established 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 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.

The legislature’s affirmation of *Costello* 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. Consistent with these authorities, Pennsylvania courts have consistently 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. Cons. Stat. Ann. § 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. Cons. Stat. Ann. §§ 5323 (a)(1), (a)(6). 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). The custody statute requires courts to consider the parties' willingness and ability to cooperate as a factor in all custody determinations. 23 Pa. Cons. Stat. Ann. § 5328(a)(13).

Domestic violence indicates elevated conflict between the parents. Some studies have shown parental conflict to be incompatible with shared custody and unhealthy for children.<sup>16</sup> 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

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<sup>16</sup> Diane N. Lye, *Report to the Washington State Gender and Justice Commission and Domestic Relations Commission* iii, 4-21 (1999).

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 with continuing opportunities for destructive and potentially lethal contact.<sup>17</sup>

**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.<sup>18</sup>

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.”<sup>19</sup> 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.”<sup>20</sup>

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<sup>17</sup> MODEL CODE, *supra* note 8, § 402, cmt. (noting importance of considering the safety of both abused parent and child when making custody determinations); *see also* Judith G. Greenburg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 411 (2005).

<sup>18</sup> D. Lee Kahachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745, 1771 (1990).

<sup>19</sup> Am. Bar Ass’n, Model Joint Custody Statute, 15 FAM. L. REP. (BNA) 1494, 1494 (1989).

<sup>20</sup> 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].



**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.<sup>21</sup>

**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:

*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);

*In re Marriage of Heilmann*, 771 P.2d 948 (Kan. Ct. App. 1989) (Not Designated for Publication) (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”), affirmed by *Custody of Vaughn*, 422 Mass. 590, 664 N.E.2d 434 (1996);

*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.”);

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<sup>21</sup> MODEL CODE, *supra* note 8, § 401.

*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 and Crafting of Partial Physical Custody Orders (historically known as Visitation)**

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 and during periods of physical custody, often referred to as visitation. Experts emphasize “that a parent’s right to visitation cannot take precedence over a child’s exposure to danger or the threat of harm.”<sup>22</sup> Addressing this concern, Marjory 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.<sup>23</sup>

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<sup>22</sup> 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].

<sup>23</sup> 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.

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 party's past violent conduct and have limited grants of partial physical custody 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).

*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).

The custody statute requires orders to include safety conditions that protect the child or abused party from further abuse if any form of custody is given to the abusive party or a party living with an abusive person. 23 Pa. Cons. Stat. Ann. § 5323 (e). This is consistent with the recommendations of the National Council of Juvenile and Family Court Judges that partial physical custody be awarded to a party who has committed domestic or family violence *only* if the court finds that adequate provision for the safety

of the child and victim can be made.<sup>24</sup> 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 (emphasis added).”<sup>25</sup>

Specific provisions that will address these concerns include:

**Ordering visitation supervised by another person or agency:**<sup>26</sup> 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 violence. Visitation is one of the few ways in which 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 custodial visits and exchange.<sup>27</sup> Some women and children have been killed in connection with custody disputes.<sup>28</sup>

**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

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<sup>24</sup> MODEL CODE, *supra* note 8, § 405.

<sup>25</sup> ABA REPORT ON THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, *supra* note 20, at 14 (emphasis added). See App. B for a sample custody and visitation order.

<sup>26</sup> MODEL CODE, *supra* note 8, § 405.

<sup>27</sup> 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).

<sup>28</sup> 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, *Fatality Reports*, available at <http://www.pcadv.org/publications>. In 2010, domestic violence claimed 169 lives in Pennsylvania. Pa. Coalition Against Domestic Violence, *Domestic Violence Fatalities in Pennsylvania — 2010*, at 2 (2010), available at <http://www.pcadv.org/Resources/2010FatalityReportWeb.pdf> (noting this number is likely under-inclusive because PCADV relies on media accounts to track domestic -related fatalities).

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).<sup>29</sup>

**Exchange of a child in a protected setting:**<sup>30</sup> Courts have taken a leading role in establishing visitation centers that have trained professional supervisors and security.<sup>31</sup> Visitation centers can enhance safety by arranging pick-up and drop-off to preclude contact between the parties, providing on-site security, screening all cases for domestic violence, and developing confidentiality policies.<sup>32</sup>

**Prohibit overnight visitation:**<sup>33</sup> 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 party.<sup>34</sup>

**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.<sup>35</sup>

**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

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<sup>29</sup> Maureen Sheeran & Scott Hampton, *Supervised Visitation in Cases of Domestic Violence*, JUV. & FAM. CT. J. 13, 17 (1999).

<sup>30</sup> MODEL CODE, *supra* note 8, § 405.

<sup>31</sup> 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).

<sup>32</sup> Sheeran & Hampton, *supra* note 29, at 17-18.

<sup>33</sup> MODEL CODE, *supra* note 8, § 405.

<sup>34</sup> 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.

<sup>35</sup> *Id.*

perpetrators or other designated counseling.<sup>36</sup> 23 Pa. Cons. Stat. Ann. § 5333. In cases involving abuse, the court may order individual counseling for the abuser but may not order the parties to attend joint counseling. 23 Pa. Cons. Stat. Ann. § 5333 (b).<sup>37</sup>

**Confidentiality of victim addresses.** The address (home, work, school, and medical providers) of the abused party and the child should be kept confidential.<sup>38</sup>

## **6. Domestic Violence Is Relevant to Friendly Parent Requirements.**

The custody statute requires the consideration of which party is more likely to “encourage and permit frequent and continuing contact between the child and another party.” 23 Pa. Cons. Stat. Ann. § 5328 (a)(1). This factor is commonly referred to as a

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<sup>36</sup> *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.

<sup>37</sup> 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 (2004), at <http://www.futureswithoutviolence.org/userfiles/file/HealthCare/pediatric.pdf>. 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.

<sup>38</sup> *See also infra* App. B (sample custody and visitation order); MODEL CODE, *supra* note 8, § 405 (maintaining the confidentiality of the victim’s location prevents stalking and further violence); *See also* 23 Pa. Cons. Stat. Ann. §§ 5309, 5336 (b), 6112.

“friendly parent” requirement. Such provisions may work to endanger victims of domestic violence<sup>39</sup> and put them at an unfair disadvantage in the custody proceeding:<sup>40</sup>

- 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.<sup>41</sup>
- 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.<sup>42</sup>

- 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.<sup>43</sup>
- 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.<sup>44</sup>

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<sup>39</sup>Joan Zorza, “Friendly Parent” Provisions in Custody Determinations, 26 CLEARINGHOUSE REV. 921, 924 (1992).

<sup>40</sup>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].

<sup>41</sup>D. Lee Kahachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745, 1769-72 (1990).

<sup>42</sup>Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 277 (1999).

<sup>43</sup>Margaret K. Dore & J. Mark Weiss, *Lawrence and Nunn Reject the “Friendly Parent” Concept*, 6 DOMESTIC VIOLENCE REP. 81, 82 (2001).

<sup>44</sup>Zorza, *supra* note 27, at 1123 (1996).

By requiring the court to give greater weight to factors relating to the safety of the child in determining custody, the custody statute directs the court **not to** consider efforts to discourage access to a child by the other parent as reasons to deny or limit that parent's custodial rights. In other words, a parent who takes steps to protect her children from the impact of domestic abuse should not be penalized in the custody process for such efforts. A parent accused of discouraging the other parent's 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.<sup>45</sup>

## **7. Domestic Violence is Relevant to Allegations of Alienation**

The custody statute instructs the court to consider a party's attempts to alienate the child from the other party; however, it explicitly excepts "reasonable safety measures [taken by a party in domestic violence situations]... necessary to protect the child from harm" from consideration. 23 Pa. Cons. Stat. Ann. § 5328(a)(8). This exception is appropriate because batterers often falsely accuse the other parent of alienating the child from them and often deny the impact of domestic violence.<sup>46</sup> They do so without any

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<sup>45</sup> Zorza, *supra* note 39, at 924-25; see also Martha Matthews, *Addressing the Effects of Domestic Violence on Children* 3 (1999) (noting that friendly parent provisions may create risks for both children and parents where there is history of domestic violence).

<sup>46</sup> 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.



evidence that the other parent's conduct caused or contributed to the child's not wanting to spend time with him.

Claims of alienation have become more common as a result of the promotion of "parental alienation syndrome" (PAS), a theory coined by Richard Gardner that promotes severance of contact between the "alienating" mother and child.<sup>47</sup> Most professionals have rejected this theory, concluding that it is unsupported by any data, unscientific and harmful to children.<sup>48</sup> Similarly, many courts have also rejected it, questioning its existence and usefulness.<sup>49</sup>

While some children may favor one parent over the other or have negative feelings towards one parent, such feelings may be well grounded due to a history of

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<sup>47</sup> See RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* (1992).

<sup>48</sup> 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 46, at 380-81 (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 46, at 530-36 (discussing flaws in Gardner's theory and commenting on emotional disruption and suffering caused to child by Gardner's recommended remedies); Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: Research Reviews*, National Online Resource Center on Violence Against Women, VAWnet.org (2009), available at [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_PAS.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_PAS.pdf); Nancy S. Erickson, *Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse, in Domestic Violence, Abuse, and Child Custody* (eds. Mo Therese Hannah & Barry Goldstein) 20-6 (2010) ("PAS and parental alienation are not recognized medical or psychological syndromes or symptoms or diagnoses, so their definitions cannot be found in any reputable medical source.").

<sup>49</sup> *People v. Fortin*, 184 Misc.2d 10, 14, 706 N.Y.S.2d 611 (County Ct. 2000), *aff'd* 289 A.D.2d 590, 591, 735 N.Y.S. 819 (N.Y. App. Div. 2001) (refusing to admit evidence of PAS at trial when defendant had not established its general acceptance in professional community); *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*, 553 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).

abuse, neglect, or other behavior.<sup>50</sup> Consideration of the abusive behavior is appropriate in such cases, particularly if the party being accused of alienation has alleged that abuse by the other party.<sup>51</sup>

In other cases, one parent may be complaining about the behavior of the other parent during a divorce, or simply truthfully answer a child's questions as to why she and the child's father are no longer together. Such behavior is not unusual and not a basis for custody determinations.

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. (Partial Physical Custody Orders).

#### **8. Domestic Violence Is Relevant to Consideration of Parents Fleeing for Safety**

Sometimes parents take steps to protect their children that appear inconsistent with a parent's commitment to his or her children or with their fitness to parent. For example, a woman may flee the home, with or without their children, or move frequently because she believes it is the only way to make the abuse stop to protect herself and her children.<sup>52</sup> Batterers often offer evidence of such conduct in support of a claim in

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<sup>50</sup> Erickson, *supra* note 48, at 20-3.

<sup>51</sup> *Id.* at 20-3-4.

<sup>52</sup> See Wanda K. Mohr, et al., *Safeguarding Themselves and Their Children: Mothers Share Their Strategies*, 16 J. OF FAMILY VIOLENCE 75, 81 (2001)**Error! Bookmark not defined.**; Leigh Goodmark, *From Property To Personhood: What the Legal System Should Do For Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 263 (1999).

custody court that a battered ex-partner is psychologically or financially incapable of caring for children.<sup>53</sup> It is important to recognize the impact of abuse on the actions an abused mother takes in order to protect her children. Therefore, to the extent a batterer relies on such protective activity to undermine the other parent's fitness, the Custody Act's prioritizing of factors affecting the safety of the child should render such evidence irrelevant.

This result is consistent with the positions of the National Council of Juvenile and Family Court Judges (NCJFCJ) and the American Bar Association Center on Children and the Law (ABA Center on Children and the Law), both of which recognize that courts should not consider a domestic violence victim's efforts to protect herself or her children as a basis for denying her custody of her children:

**NCJFCJ:** 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.<sup>54</sup> 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

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<sup>53</sup> See Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 48-49 (1990).

<sup>54</sup> MODEL CODE, *supra* note 8, § 402.2.

affirmative defense to the allegation of child abandonment.<sup>55</sup>

**ABA 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.***<sup>56</sup>

Pennsylvania courts have acted in accordance with these recommendations:

- 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 three moves with disfavor as they were motivated out of necessity to escape domestic violence), overruled on other grounds by, *G.B. v. M.M.B.*, 448 Pa. Super. 133; 670 A.2d 714 (1996).
- 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).

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<sup>55</sup> *Id.* § 402.2 cmt.

<sup>56</sup> ABA REPORT ON THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, *supra* note 20, at 14 (*emphasis added*).

## 9. Domestic Violence Is Relevant to Evaluating Relocation Requests

The ability of a domestic violence victim to relocate with her 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.<sup>57</sup> 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.<sup>58</sup>

If the court holds a relocation hearing, it must first decide whether the proposed move qualifies as a relocation. A party who sends notice of relocation using the above procedures does not concede the proposed move is a relocation. *C.M.K. v. K.E.M.*, 2012 PA Super 76, 45 A.3d 417, 425; *see infra*, Section IV.V.H. (evidentiary considerations and procedures related to relocation). Rather, a relocation occurs if the proposed move would “significantly impair the ability of the non-relocating party to exercise custodial rights.” 23 Pa. Cons. Stat. Ann. § 5322 (a). To determine whether a proposed move would significantly impair custodial rights, the court may consider whether it would break the continuity and frequency of the non-relocating party’s involvement with the child. *C.M.K.*, 45 A.3d 417, 422 (finding the mother’s sixty-eight mile move would

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<sup>57</sup> *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”).

<sup>58</sup> *Id.*

significantly impair the father's exercise of custodial rights by ending his regular involvement in child's sports, school and medical activities).

Once the court determines that a proposed move qualifies as relocation, it must consider whether the move furthers the best interest of the child. *Id.* The custody statute sets forth specific factors to be considered by a court in reviewing a relocation request. 23 Pa. Cons. Stat. Ann. § 5337. As with the best interest factors, the custody statute requires the court to give weighted consideration to those factors which affect the safety of the child. *Id.* The court must consider all of these factors when making its relocation determination, and state both its reasoning and conclusions on the record. *E.D. v. M.P.*, 2011 PA Super. 238, ¶¶12-14, 33 A.3d 73, 81 . The court should apply the section 5337 factors, and not the section 5328(a) factors, whenever a party has objected to modification of the custody order in his or her section 5337 relocation counter-affidavit. *Id.* at ¶ 15, 82 n.6.

These relocation factors include:

- the nature, quality, extent of involvement and duration of the child's relationship with the parties, siblings, and other important persons;
- the age, developmental stage, needs of the child and the probable impact of relocation on the child's development;
- the logistical and financial feasibility of preserving the child's relationship with the non-relocating party through suitable custody arrangements;
- the child's preference, based on age and maturity;
- whether there is an established pattern of conduct by either party to promote or thwart the child's relationship with the other party;

- whether the relocation will enhance the quality of life of the party seeking relocation via a financial, emotional, educational or other benefit;
- whether the relocation will enhance the child's quality of life via a financial, emotional, educational or other benefit;
- the reasons and motivation of each party for seeking/opposing the relocation;
- the present and past abuse committed by a party or a household member of the party and whether a continued risk of harm to the child or another abused party exists;
- any other relevant factor.

23 Pa. Cons. Stat. Ann. § 5337.

Pennsylvania courts have a history of approving requests by domestic violence victims to relocate:

*Landis v. Landis*, 2005 Pa. Super. 78, 869 A.2d 1003, 1014 (reversing an order denying the mother's request to relocate because the lower court did not adequately consider the PFA entered against the father, the subsequent criminal contempt charges brought against the father, and the availability of jobs for the mother in the town to which she intended to move);

*Gruber v. Gruber*, 400 Pa. Super. 174, 187-90, 583 A.2d 434, 439-41 (1990) (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 in Pennsylvania**

Before making an award of custody to a party 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 a party or a member of a party's household does not pose a threat of harm to the child if such a person has been convicted of or pled no contest to any of the following enumerated crimes:

- criminal homicide,
- aggravated assault,
- terroristic threats,
- stalking,
- kidnapping,
- unlawful restraint,
- false imprisonment,
- luring a child into a motor vehicle or structure,
- rape,
- statutory sexual assault,
- involuntary deviate sexual intercourse,
- sexual assault,
- aggravated indecent assault,
- indecent assault,
- indecent exposure,
- sexual intercourse with an animal,
- conduct relating to sex offenders,
- arson and related offenses,
- incest,
- concealing death of a child,
- endangering the welfare of children,
- dealing in infant children,
- prostitution and related offenses,
- obscene and other sexual materials and performances,
- corruption of minors,
- sexual abuse of children,



- unlawful contact with a minor,
- sexual exploitation of children,
- contempt for violation of a protection order or agreement,
- driving under the influence of alcohol or controlled substances,
- driving after imbibing alcohol or utilizing drugs,
- manufacture, sale, delivery, holding, offering for sale or possession of any controlled substance prohibited under The Controlled Substance, Drug, Device and Cosmetic Act.

23 Pa. Cons. Stat. Ann. § 5329 (a).

In cases involving a party or household member who has been convicted of or pled guilty or no contest to any of the above offenses, an initial evaluation must be performed to determine whether the offending individual poses a threat of harm to the child and whether counseling is necessary. *Id.* § 5329(c). The evaluation should occur at the offending individual’s initial in-person contact with the court and should be performed by a judge, court officer or other appointed person. *Id.* The initial evaluation should not be conducted by a mental health professional. *Id.* After the initial evaluation, the court may order further evaluation or counseling by a mental health professional when necessary. *Id.* If the court determines that counseling is necessary, it must appoint a qualified professional to counsel the offending individual. *Id.* § 5329(d).<sup>59</sup>

Parties seeking custody while incarcerated have no right to an evaluation or court-appointed counseling. *D.R.C. v. J.A.Z.*, No. 27 MAP 2010, slip op. at 16 (Pa. Nov. 23,

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<sup>59</sup> The counseling must be designed to rehabilitate the offending individual and to address issues that include but are not limited to physical and sexual abuse, the psychology of the offender, and the effects of the abuse on the victim. 23 PA. Cons. Stat. Ann. § 5329(d)(2). If the court awards custody or partial custody to the offending individual, the court may also order periodic counseling and reports on both the parent’s progress and the well-being of the child. *Id.* § 5329(e). Based on these reports, the court may modify custody to protect the well-being of the child. *Id.*

2011). When evaluating requests for prison visits, courts must determine whether visits would further the best interest of the child using additional factors, such as:

- the age of the child;
- the distance and hardship to the child in traveling to the visitation site;
- the type of supervision at the visit;
- identification of the person(s) transporting the child and by what means transportation will occur;
- the physical and emotional effect on the child;
- whether the incarcerated parent has and does exhibit a genuine interest in the child;
- whether reasonable contact was maintained in the past.

*Id.*

## **2. Murder**

The custody statute prohibits an award of custody, partial custody or supervised physical custody 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. 23 Pa. Cons. Stat. Ann. § 5329(b).

## **3. Criminal Charges**

The court may award temporary custody to the other party or modify a custody order if it finds that a party charged with a crime poses a risk of physical, emotional or psychological harm to the child. *Id.* § 5330(b). *See DeNillo v. DeNillo*, 369 Pa. Super. 363, 367, 535 A.2d 200, 202 (1987) (remanding to allow trial court to consider father's charge of indecent exposure in its custody determination, despite father's subsequent entry into accelerated rehabilitation program); *Sawko*, 425 Pa. Super. at 454-57 (finding trial court abused its discretion by not inquiring further into father's charge of careless

driving in light of mother's assertion that father was drunk and with their child at the time of the citation).

- The criminal information upon which the court acts may be obtained and must be used pursuant to 42 Pa. Cons. Stat. Ann. § 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. Failure to apply for such information does not prejudice any party in the custody proceeding. 23 Pa. Cons. Stat. Ann. § 5330(c).
- The only offenses which may be considered include those identified above for which a conviction is relevant.
- If a party moves for temporary custody or modification of an existing order due to pending criminal charges, the court must hold an expedited hearing. 23 Pa. Cons. Stat. Ann. § 5330(a).

#### **D. Consideration of Child's Preference**

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. Cons. Stat. Ann. § 5328(a)(7) (listing the "well-reasoned preference of the child" as a factor to be considered by the court, based on the child's maturity and judgment); "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:

**Good reasons.** A child's preference will be considered where based on good reasons. 23 Pa. Cons. Stat. Ann. § 5328(a)(7)(stating the court should consider the child's "well-reasoned preference" when making its determination); *McMillen*, 529 Pa. at 203, 602 A.2d at 847; *Kirkendall*, 2004 PA Super. 55, ¶ 17, 844 A.2d at 1264; *Watters v. Watters*, 2000 PA Super. 224, ¶ 7, 757 A.2d 966, 969 (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.*;
- 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. 23 Pa. Cons. Stat. Ann. § 5328(a)(7)(stating consideration of the child’s preference must be based on the child’s maturity); *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 parties 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).

#### **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. Cons. Stat. Ann. § 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.<sup>60</sup> 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.<sup>61</sup> While additional evidence is often helpful to the court, neither the PFA Act nor the Custody Act requires corroboration of victim testimony. 23 Pa. Cons. Stat. Ann. §§ 5321-5340, -6117; *see also, Hood-O'Hara v. Wills*, 2005 PA Super 145, ¶12, 873 A.2d 757, 761 ("Nowhere in the Protection from Abuse Act itself, or in the body of case law

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<sup>60</sup> *See* NANCY K.D. LEMON, DOMESTIC VIOLENCE AND CHILDREN, RESOLVING CUSTODY AND VISITATION DISPUTES: A NATIONAL JUDICIAL CURRICULUM 75 (1995).

<sup>61</sup> *Id.*

interpreting it, is there a requirement that a police report be filed or that there be medical evidence of an injury in order to sustain the burden of proof. A petitioner simply must show by a preponderance of evidence that she suffered abuse as defined by the statute”); *Coda v. Coda*, 446 Pa. Super. 296, 666 A.2d 741 (1995) (holding testimony of petitioner was sufficient).

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.<sup>62</sup> It is important to understand that 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.<sup>63</sup> 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.<sup>64</sup>

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

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<sup>62</sup> 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).

<sup>63</sup> PETER G. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 17 (2003); Dalton, *supra* note 42, at 191-92.

<sup>64</sup> 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).

- domestic violence tends to increase or intensify during separation, the time when a couple is also likely to be determining custody of children.<sup>65</sup>
- victims of domestic violence may not previously have felt safe enough to reveal the abuse.

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 Landis v. Landis*, 2005 PA Super 78, ¶ 29, 869 A.2d 1003, 1014 (reversing an order denying the mother’s request to relocate because the lower court did not consider the PFA entered against the father, the subsequent criminal contempt charges brought against the father, and the availability of jobs for the mother in the town to which she intended to move); *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

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<sup>65</sup> *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/journals/archive.html> (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 27, 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 July 10, 2012); Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN’S RTS. L. REP. 107, 118 (1992).



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:** Police reports are admissible as official records kept within the Commonwealth pursuant to 42 Pa. Cons. Stat. Ann. § 6103(a) and may be admitted as evidence tending to prove the existence of the facts reported therein, pursuant to 42 Pa. Cons. Stat. Ann. § 6104(b) so long as the facts are recorded pursuant to an official duty and are trustworthy *D'Alessandro v. Pennsylvania State Police*, 2007 PA. Lexis 2431 \*21-27; *see also Commw. v. May*, 587 Pa. 184, 898 A.2d 559, 565 n.12 (2006) (police reports are exempt from hearsay disqualification under 42 Pa. Cons. Stat. Ann. § 6104).
- **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. Pa. R. Evid. 803(2).
- **Conviction and Arrest Records:** Records of convictions and arrests are admissible under 42 Pa. Cons. Stat. Ann. § 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. Cons. Stat. Ann. § 6108.

The records admissible under this statute and/or the Rules of Evidence 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. Cons. Stat. Ann. § 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. Cons. Stat. Ann. § 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. *Commw. v. McEnany*, 1999 Pa. Super. 112, ¶ 26, 732 A.2d 1263, 1272.

### **4. Computer Records**

A plaintiff may wish to introduce evidence to show that the perpetrator abused through harassing emails or instant messages. Internet service providers or other providers of electronic communication service may disclose records or other information, pertaining to a subscriber or customer. 18 Pa. Cons. Stat. Ann. § 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; *See A.J.B. v. M.P.B.*, 2008 PA Super 39, 945 A.2d 744. Testimony from a domestic violence expert can illuminate important issues that trained custody evaluators and mental health professionals may overlook.<sup>66</sup> For an expert report to be admissible in a custody case:

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<sup>66</sup> See Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 288-95 (2002) (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 of child 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.*; see Judge Marjory D.

- 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.<sup>67</sup>

**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.<sup>68</sup> 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

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Fields, *Lawyer Skills Training for DV Representation: Tips from a Retired Judge*, 12 DOMESTIC VIOLENCE REP. 1 (critiquing expert reports in custody cases).

<sup>67</sup> BARBARA J. HART, STATE CODES ON DOMESTIC VIOLENCE: ANALYSIS, COMMENTARY AND RECOMMENDATIONS 35 (1992).

<sup>68</sup> See Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 45 (2000).

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. Cons. Stat. Ann. § 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 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. Cons. Stat. Ann. § 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.*

Treatment records protected by the psychiatrist and psychologist/patient privilege cannot be divulged without consent even where the individual demanding such disclosure asserts its relevance to the determination of the “best interests of the child” in a custody hearing. *Leskin v. Chirsman*, 78 Pa.D. & C.4<sup>th</sup> 152, 158-59 (Pa. Com. Pl. 2006).

Furthermore, section 7111 of the Mental Health Procedures Act applies to all documents related to mental health treatment and provides that such documents “shall be kept confidential and, without the person’s written consent, may not be disclosed to anyone,” except under limited circumstances described in the statute. 50 Pa. Stat. § 7111(a); *See Gates v. Gates*, 2009 PA Super. 40, \*P13, 967 A.2d 1024, 1029; *M.M. v. L.M.*, 2012 PA Super 195, \*12, 55 A.3d 1167,1172.

**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. Cons. Stat. Ann.§ 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. Cons. Stat. Ann. § 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. Cons. Stat. Ann. §§ 5401-5482, which became effective on August 15, 2004. *See infra* App. F-5 (UCCJEA in its entirety). As a general rule, initial 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. *See O’Gwynn v. Hebert*, 2005 PA Super 226, 878 A.2d 119 (2005) (affirming trial court’s denial of jurisdiction in custody matter initiated under the UCCJEA’s predecessor, noting its similarity to emergency jurisdiction under the UCCJEA, concluding that “emergency jurisdiction under the [Uniform Child Custody Jurisdiction Act] must be reserved for situations in which the child is in immediate danger of suffering harm,” but noting that “in some instances, a mother who

feels threatened by her spouse will be reluctant to initiate court proceedings in her home state, especially while still living with her husband.”).

Emergency jurisdiction under the UCCJEA is temporary and remains in effect only until an order is obtained from a state with jurisdiction. 23 Pa. Cons. Stat. Ann. § 5424 (b). A temporary custody order may become permanent if no order is subsequently obtained from such a state. *Id.* 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.<sup>69</sup>

- 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). *Cf. Al-Raddahi v. Al-Raddahi*, No. 322 of 2006, 2006 WL 5483095 at \*1 (Pa. Com. Pl., Columbia Cty., May 17, 2006) (applying section 5428 and finding the plaintiff’s efforts to escape the defendant’s abuse were justifiable where she and their child left Saudi Arabia under the guise of a temporary family visit and refused to return).

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<sup>69</sup> 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).

- 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.

## **B. Standing**

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

- a parent of the child,
- a non-parent who has acted *in loco parentis*, or
- a grandparent of the child not *in loco parentis*, whose relationship began with the consent of a parent or under court order, who is willing to assume responsibility for the child, and where the child is either a dependent, at risk of abuse or neglect, or has lived with the grandparent for at least one year.

23 Pa. Cons. Stat. Ann. § 5324.

Additionally, grandparents and great-grandparents may obtain partial or supervised physical custody if:

- the child's parent is deceased and the petitioning party is the parent or grandparent of the deceased parent;
- the child's parents have been separated for at least six months or have commenced and continued a proceeding to dissolve their marriage; or
- the child has resided with the party for at least twelve consecutive months, is removed from the party's home by the parents, and the action is filed within six months from removal.

23 Pa. Cons. Stat. Ann. § 5325.

## **C. Parenting Plans**

To assist it in determining the custodial rights of the parties, the court may also require the parties to submit parenting plans for the care and custody of the child. 23 Pa.

Cons. Stat. Ann. § 5331 (a). Parenting plans must include a parenting time schedule, the child's education and religious involvement, the child's healthcare, childcare and transportation arrangements, a procedure to resolve proposed changes or disagreements, and any other matter specified by the court. *Id.* §§ 5331(b), 5331(c) (including the parenting plan form); *see infra* App. F-3.

## **D. 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,<sup>70</sup> the Association of Family and Conciliation Courts,<sup>71</sup> and the American Academy of Child and Adolescent Psychiatry<sup>72</sup> 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 Courts, a child custody evaluator must investigate all allegations of domestic violence.<sup>73</sup> Other experts recommend that custody evaluators explore whether domestic violence is

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<sup>70</sup> Am. Psychological Ass'n, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677 (1994) [hereinafter *Guidelines*]

<sup>71</sup> Ass'n of Fam. & Conciliation Cts., *Model Standards of Practice for Child Custody Evaluation* (2006), <http://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/ModelStdsChildCustodyEvalSept2006.pdf> [hereinafter *Model Standards*].

<sup>72</sup> Am. Acad. of Child & Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluations*, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 57S (1997) [hereinafter *Practice Parameters*]

present in all families, as many individuals seek to hide it.<sup>74</sup> 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:

**Ensure 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.<sup>75</sup> Further, some guidelines require that an evaluator not possessing expertise about domestic violence seek outside consultation with appropriately trained professionals.<sup>76</sup> In addition, to the extent that an evaluation includes psychological testing, only evaluators with sufficient training and experience in psychological testing should conduct such testing.<sup>77</sup>

**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.<sup>78</sup> 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.<sup>79</sup>

**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

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<sup>73</sup> *Model Standards*, *supra* note 71, at 1.2.

<sup>74</sup> *See, e.g.*, STAHL, *supra* note 48, at 31.

<sup>75</sup> *Model Standards*, *supra* note 71, at 1.1; *Practice Parameters*, *supra* note 73, at 59S, 62S; *Guidelines*, *supra* note 71, at 678 (Guideline II.5.A.).

<sup>76</sup> *Model Standards*, *supra* note 71, at 5.11; *Guidelines*, *supra* note 70, at 678 (Guideline II.5.C.).

<sup>77</sup> *Model Standards*, *supra* note 71, at 6.2.

<sup>78</sup> *Model Standards*, *supra* note 71, at IV.F.

<sup>79</sup> STAHL, *supra* note 48, at 34-35.

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 (2002), <http://www.apa.org/ethics/code2002.pdf> (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. Pa. R. Civ. P. 1915.8(b); *see also Rummel*, 263 Pa. Super. 97.

### **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 .

#### **E. 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.

#### **F. 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.<sup>80</sup>

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<sup>80</sup> See ABA REPORT ON THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, *supra* note 20, 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 40, at 19-30.



Pennsylvania law authorizes only *voluntary* mediation in custody cases. 23 Pa. Cons. Stat. Ann. § 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. Cons. Stat. Ann. § 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.<sup>81</sup>
- 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:

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<sup>81</sup> A RESOURCE HANDBOOK, *supra* note 40, 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.<sup>82</sup>

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

### **G. 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 victim of abuse or “confidential information from an abuse counselor or shelter.” 23 Pa. Cons. Stat. Ann. § 5336(b).
- Pennsylvania’s child support statute provides special protection for the privacy rights of abuse victims. Pursuant to 23 Pa. Cons. Stat. Ann. § 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;

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<sup>82</sup> *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.

#### **H. Relocation**

The custody statute includes very specific procedural requirements to be followed when a parent seeks to relocate with the child(ren). Rulemaking will assist both the court and litigants in the processing of these requests. At this time, the only guidance is in the statutory provisions themselves.

To initiate proceedings, the party seeking relocation must send notice of the proposed relocation, via certified mail, to all individuals with custody rights to the child. *See supra*, section III.B.9 (for more information on relocation). 23 Pa. Cons. Stat. Ann. § 5337 (c). This notice must contain a proposed revised custody schedule and a counter-affidavit, which the non-relocating party can use to object to the relocation or the proposed schedule. To object, the non-relocating party must file the counter-affidavit with the court within thirty days of the notice. *Id.*

If no objections are filed, the party seeking relocation must file an affidavit with the court to confirm the relocation, provide proof that proper notice was given, file a petition to confirm the relocation and modify the underlying custody order, and file a

proposed order that contains the information required in section 5337(c)(3). 23 Pa. Cons. Stat. Ann. § 5337(e). If the non-relocating party files a counter-affidavit that objects to the relocation or to the modification of the existing custody order, the custody statute requires the court to hold a hearing to determine the terms and conditions of the order before the relocation occurs. 23 Pa. Cons. Stat. Ann. § 5337 (f); 23 Pa. Cons. Stat. Ann. § 5337 (g).

These procedural requirements may be modified where domestic violence is present. Typically, notice of relocation must contain detailed information about the new residence, including its address, telephone number, and school district; however, the court cannot require disclosure of domestic violence victim’s addresses.<sup>83</sup> 23 Pa. Cons. Stat. Ann. §§ 5336, 5337 (c)(3). Although the court may consider a party’s failure to provide notice as a factor in its relocation determination, this failure must be mitigated where it was caused, in whole or in part, by abuse. 23 Pa. Cons. Stat. Ann. § 5337 (k). Such a situation may arise, for example, where a party “relocates” by entering a domestic violence shelter. The court may also approve a relocation prior to a hearing if exigent circumstances exist. *Id.*

## **I. Contempt**

### **1. Violations of a Custody Order**

A party may be held in contempt for willfully failing to comply with a partial physical custody order. 23 Pa. Cons. Stat. Ann. § 5232(g); *Langendorfer v. Spearman*,

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<sup>83</sup> The Notice of Relocation and other documents, including the counter-affidavit and the petition to confirm, are available at PA Law Help under “Children and Families,” “Self-Help (Pro Se) Forms and Information,” <http://www.palawhelp.org/> (last visited Dec. 27, 2012).

2002 PA Super. 93, ¶ 16, 797 A.2d 303, 308. The petition for civil contempt must comply with the format required by Pa. R. Civ. P. 1915.12, and it must be served by personal service or regular mail. Pa. R. Civ. P. 1915.12(d); *See Everett v. Parker*, 2005 PA Super 404, 889 A.2d 578. 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.7.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. Cons. Stat. Ann. § 4346

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.<sup>84</sup>

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. Cons. Stat. Ann. § 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.

## **J. 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

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

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."<sup>85</sup> 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.<sup>86</sup> 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."<sup>87</sup>

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 interviewed in a less threatening environment recalled more information correctly through free recall than those questioned in a courtroom.<sup>88</sup> 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 *Ottolini v. Barrett*, 2008 PA Super 154, ¶ 10, 954 A.2d 610, 613; *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)

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<sup>85</sup> 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)).

<sup>86</sup> See generally *id.*

<sup>87</sup> *Id.* at 296.

<sup>88</sup> *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)).



**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.<sup>89</sup> Additionally, the court may emphasize to the child that the outcome of the process is not his/her responsibility.<sup>90</sup>

## **K. Representation of Children in Custody Proceedings**

Most contested custody cases feature some measure of competition between parents, and sometimes with third parties as well, 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.<sup>91</sup> Under the new custody statute, a child may have a guardian *ad litem*, counsel, or both appointed in order to assist the court in ensuring that it has all the information it needs, including the child's wishes, preferences and perspectives, to make the best interest determination. 23 Pa. Cons. Stat. Ann. §§ 5334, 5335. In addition, a lawyer representing a child as either a guardian *ad litem* or as counsel is in a position to take steps to protect the child by addressing with the child any insecurity or instability that may result from the litigation itself.

### **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

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<sup>89</sup> *Id.* at 310.

<sup>90</sup> *See id.* at 321 n. 570.

<sup>91</sup> *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).

make the appointment of an attorney for a child discretionary in a custody case.<sup>92</sup>

Pennsylvania law is generally consistent with this recommendation. Pennsylvania law allows, but does not require, the appointment of a lawyer representative for a child in a custody case.<sup>93</sup> 23 Pa. Cons. Stat. Ann. §§ 5334, 5335; Pa. R. Civ. P. 1915.11(a) *see, e.g., In re Davis*, 288 Pa. Super. 453, 468 n. 6, 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.<sup>94</sup>

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

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<sup>92</sup> 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*].

<sup>93</sup> By contrast, the Juvenile Act, 42Pa. Cons. Stat. Ann. §§ 6301-65, mandates the appointment of a lawyer representative for the child in all dependency cases. Also, The Adoption Act, at 23 Pa. Cons. Stat. Ann. §§2313, provides the court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both parents.

<sup>94</sup> *ABA Custody Standards, supra* note 92, at 152.

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.

Though the Court retains discretion over the appointment of a lawyer for the child, it must be noted that section 5334 (c) of the Act provides that if substantial allegations of abuse of the child are made, the court shall appoint a guardian *ad litem* (discussed below) if counsel for the child has not been appointed pursuant to section 5335 or the court is satisfied that the relevant information will presented be to the court only with such appointment.

## **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.<sup>95</sup> *See* 23 Pa. Cons. Stat. Ann. § 5335.
- 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.<sup>96</sup> *See* 23 Pa. Cons. Stat. Ann. § 5334.

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<sup>95</sup> 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.

<sup>96</sup> 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.

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. At times, it may be unclear 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. In custody cases, where there is a *guardian ad litem*, who must be an attorney, but no separate counsel for the child, the *guardian ad litem*’s role is to represent “the legal interests and the best interests of the child during the proceedings.” 23 Pa. Cons. Stat. Ann. § 5334(b). In a custody case where a child has both a *guardian ad litem* and counsel, “counsel shall represent the legal interests of the child and the guardian ad litem shall represent the best interests of the child.” 23 Pa. Cons. Stat. Ann. § 5335(a).

Most authorities agree that the court making the appointment should clarify the role it expects the appointed lawyer to serve.<sup>97</sup>

- 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 position, and advocate zealously to the parties and in court for the client’s position.<sup>98</sup>
- 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.<sup>99</sup>

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<sup>97</sup> *Id.* at 154.

<sup>98</sup> *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).

<sup>99</sup> *Id.* at 134.

### 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.<sup>100</sup> 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.
- In a 2010 revision of its standards, the American Academy of Matrimonial Lawyers (AAML) rejects the use of the term guardian *ad litem* as well as the traditional "best interest" practice of law that might tend to discredit or contradict a client-child's stated wishes. For children who the lawyer deems to be competent, the attorney should follow the client's direction in the traditional approach to lawyering.<sup>101</sup> For younger children or those with diminished capacity, the AAML suggests a new term and role: "Court-Appointed Professionals Other than Counsel for the Child", whether or not licensed to practice law, who is appointed in a custody or visitation case for the purpose of assisting the court in deciding the case.

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<sup>100</sup> 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.

<sup>101</sup> AM. ACAD. OF MATRIMONIAL LAWYERS, REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS 10 (2010).

## 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.<sup>102</sup> In 1996, child protective services agencies nationwide received reports of over 3 million abused children, 80% by a parent.<sup>103</sup> 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 3.3<sup>104</sup> to 10 million.<sup>105</sup>

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 physical child abuse.<sup>106</sup> Additional research reports an overlap of child exposure to partner violence and physical abuse that ranges from 20% to 100%, depending on the

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<sup>102</sup> 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).

<sup>103</sup> OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, 1999 NATIONAL REPORT SERIES: CHILDREN AS VICTIMS 1 (2000).

<sup>104</sup> 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).

<sup>105</sup> 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.).

<sup>106</sup> 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).

research sample and methodology, with 40% the median.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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.<sup>110</sup> Research has also shown that sons of wife-battering fathers often become aggressive and violent.<sup>111</sup> As the Family Violence Project of the National Council of Juvenile and Family Court Judges (NCJFCJ) has emphasized, “[s]ocial scientists and 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.”<sup>112</sup>

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<sup>107</sup> 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).

<sup>108</sup> 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.

<sup>109</sup> See LINDA LANGFORD ET AL., HOMICIDES RELATED TO INTIMATE PARTNER VIOLENCE IN MASSACHUSETTS 1991-1995, at 10 (1999) (finding that 22 out of a total of 194 victims were children killed by their mothers' partners).

<sup>110</sup> 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).

<sup>111</sup> JAFFE, *supra* note 63, at 32-75.

<sup>112</sup> Family Violence Project, *supra* note 22, at 198.

Indeed, the impact on children of witnessing the abuse of other family members can be profound.<sup>113</sup> Multidisciplinary findings have shown that the effects of witnessing violence alone are serious, varied, and manifested both behaviorally and emotionally.<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup> The problems can be grouped into three main categories: (1) behavioral and emotional; (2) cognitive functioning and attitudes about the use of violence; and (3) longer term developmental problems.<sup>117</sup>

Behaviorally and emotionally, many children who witness their fathers abuse their mothers exhibit more aggressive and antisocial (or "externalized") behaviors as well

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<sup>113</sup> 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.

<sup>114</sup> *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).

<sup>115</sup> Zorza, *supra* note 27, 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).

<sup>116</sup> Edleson, *supra* note 113 ("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.").

<sup>117</sup> *Id.*



as fearful and inhibited (or “internalized”) behaviors.<sup>118</sup> They also show more anxiety, depression, anger, reduced self-esteem, and other temperament problems than other children.<sup>119</sup>

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.<sup>120</sup>

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 trauma-related symptoms.<sup>121</sup> These symptoms can lead to drug and alcohol abuse and other problems stemming from social mal-adjustment.<sup>122</sup>

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

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See David A. Wolfe & Barbara Korsch, *Witnessing Domestic Violence During Childhood and Adolescence: Implications for Pediatric Practice*, 94 PEDIATRICS 594, 595 (1994).

<sup>121</sup> See Edelson, *supra* note 113, at 2.

<sup>122</sup> See *id.*

themselves. This profoundly changes their view of the world, and the effects are long-lasting.<sup>123</sup>

Separation may escalate the nature and severity of the violence to which a woman and her children are subjected.<sup>124</sup> 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.<sup>125</sup> Indeed, "[a]fter separation, many abusers discover that using children is the best way to hurt their former partners."<sup>126</sup> Batterers may devalue their wives and convince police, judges, and others that the women are not caring for the children.<sup>127</sup> Thus, leaving a batterer places a battered woman and her children at grave risk of serious danger.

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<sup>123</sup> *See id.*

<sup>124</sup> *See supra* note 65.

<sup>125</sup> 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).

<sup>126</sup> Zorza, *supra* note 39, at 1115.

<sup>127</sup> *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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## **Appendix A: Supervised Visitation Centers**

## SUPERVISED VISITATION CENTERS

Supervised visitation at a visitation center is a useful and concrete safety mechanism that can easily be included in a court order. While supervised visitation programs have been common in child abuse and neglect cases for some time, they have not been as routinely used in custody and divorce proceedings. The recent literature, however, suggests an increase in use of these centers for domestic relations cases, particularly for those involving findings or allegations of domestic violence.<sup>1</sup> It is important for judges to remain cognizant of visitation centers as a viable option in domestic relations cases and to actively work with the centers to try to meet the needs of all parties involved.

One of the major problems judges face, however, is the absence of visitation centers as a result of limited resources, largely due to a lack of state and federal funding.<sup>2</sup> Currently only a handful of states either provide specific funding for supervised visitation centers or have initiated a legislative or budgetary scheme towards this end.<sup>3</sup> Because of the paucity of structured visitation centers, courts are often left to come up with imaginative alternatives. Some judges have turned to ordering third-party or informal supervision.<sup>4</sup> Often, these alternative arrangements mean that the parents are asked to come up with names of supervisors. While the aim of trying to provide some

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<sup>1</sup> See Barbara E. Flory et al., Note: *Supervised Access and Exchange Services: The Parental Experience*, 39 FAM. CT. REV. 469 (2001).

<sup>2</sup> See Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 229, 235 (1995); see also Amy B. Levin, Comment, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 856 (2000).

<sup>3</sup> Straus, *supra* note 2, at 235.

<sup>4</sup> See *id.* at 249.

measure of supervision is commendable, there are some significant problems with this practice. Left on their own, the parties will most likely come up with names of family members. Although family members are probably the most likely to provide the least expensive supervision, they are often inappropriate.<sup>5</sup> A family member may not feel comfortable confronting the visiting parent about problem behavior during the visit or may think that the parent is harmless and thus not closely supervise the visit at all. Overall, any potential bias a relative may harbor could prove to be problematic when that person is faced with a supervisory role during visitation. “At a minimum, a supervisor should be independent enough from the parent being supervised to properly monitor the parent’s behavior.”<sup>6</sup>

Because of these problems inherent in third-party supervision and because of the dearth of visitation centers, it is imperative that courts explore the possibility of creating supervised visitation centers in their respective communities. Courts need to take leadership in bringing various stakeholders in the community together to investigate funding possibilities and resources. To this end, the National Council of Juvenile and Family Court Judges has taken the stance that judges must provide leadership in the courts and the larger communities to make sure that domestic violence cases are effectively managed and that the needed resources are available to do so.<sup>7</sup> Hence, judges ought to play a key role in the development of visitation centers within the community.

Through research, advocates have found that:

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<sup>5</sup> *See id*; see also Maureen Sheeran & Scott Hampton, *Supervised Visitation in Cases of Domestic Violence*, 50 JUV. & FAM. CT. J. 13, 22 app.

<sup>6</sup> Straus, *supra* note 2, at 249.

<sup>7</sup> Sheeran & Hampton, *supra* note 5, at 25 n.8 (citing S. HERRELL & M. HOFFORD, FAMILY VIOLENCE: IMPROVING COURT PRACTICE (1990)).

Not only can judges provide an important voice in articulating the need for formal visitation services in their communities, but also they can assist tremendously in the development of services. Because judges are important stakeholders in visitation services, their input at the development stage helps foster clear expectations among courts, visitation providers, and others, and contributes to the collective understanding of how services can best assist families in court.<sup>8</sup>

Once a visitation center is formed, however, the court must continue to play a role. Courts must give guidance to all parties involved, including the visitation center itself. As one commentator stated:

The court must play an aggressive oversight role . . . . In making orders referring cases to supervised visitation centers, the order must provide sufficient information so that the center can do its job, the parents can know what to expect, and the court can be informed of problems that may arise. Most essentially, the order must contain the referral, the services to be provided (e.g., supervised visitation or supervised exchange), identify the duration and frequency of contact, who may have contact with the children, who will pay for the services, and the type and frequency of reporting back to the court the progress of the visitation.<sup>9</sup>

Thus, a court must be specific in identifying what it is asking from all parties involved, particularly the visitation center. Centers may offer a range of services including on-site supervision, off-site supervision, exchange monitoring, therapeutic supervision, telephone monitoring, transportation to and from visits, recording observations of visits, factual reports, and referrals to other services.<sup>10</sup> The court is

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<sup>8</sup> *Id.* at 23 app.

<sup>9</sup> Julie Kunce Field, *Visits in Cases Marked by Violence: Judicial Actions That Can Help Keep Children and Victims Safe*, 35 CT. REV. 23, 25 (1998).

<sup>10</sup> *Id.* at 10.



responsible for specifying in the order exactly what service the center is to provide.<sup>11</sup>

Because it is the court that establishes which services the center is to provide and when, it is the court's responsibility to monitor and oversee the actualization of the order.

One way for courts to ease the burden of such aggressive oversight is to develop or adopt already existing standards and guidelines for the implementation and execution of supervised visitation.<sup>12</sup> Centers should only offer and courts should only order those services that are outlined in the standards and for which the center staff is trained. The standards will thus provide clarity about the services the center will provide, as well as spell out the expectations that are placed on the courts, parents, and staff. For example, the parents should know and the guidelines should specify whether it is the parents or the center staff that carries the responsibility of ensuring that the essentials for the visit, such as any needed medication or food, are provided. In the same way, center staff should know if they are required to provide factual reports of the visit (e.g., whether either party was late, compliance of the parties with program rules, etc.), to whom they are to be provided (e.g., to the court or to the parents), and in what format they are to be provided (e.g., verbal or written, summary or incident reports, etc.).<sup>13</sup>

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<sup>11</sup> If and when a court asks for visitation reports, it should be cognizant of the fact that although a center may provide limited factual reports, it is generally not within the purview of the visitation center staff to perform evaluations or make recommendations to the court. Ideally, in order to preserve objectivity in the visitation setting, specialists should conduct evaluations, and they should take place somewhere other than the visitation facility. If a supervised visitation provider does perform evaluations, she should make statements of opinion only if she is specifically requested to do so by the court, she is specially trained to provide the type of evaluation that is requested, both parents are informed about the evaluation, and the provider follows procedures that are generally accepted as adequate for an evaluation. *Id.* at 11.

<sup>12</sup> See, e.g., Supervised Visitation Network, *Standards and Guidelines for Supervised Visitation Practice*, available at <http://www.svnetwork.net/301Guidelines.html> (last edited May 2000); Office of the Kansas Attorney General Child Exchange and Visitation Center Guidelines, available at <http://www.ink.org/public/ksag/contents/children/cevc-6.htm> (last revised March 1999).

<sup>13</sup> See Supervised Visitation Network, *supra* note 12.

Guidelines are also useful in developing appropriate security measures. It is essential that every measure possible is taken to make the center as safe as it can be. Particularly because centers are utilized more and more by families with histories of violence, it is important that they develop written rules and security procedures and distribute them to staff and clients in an effort to protect all parties. Some recommendations for safety measures include:

- Having a person trained in security and the avoidance of domestic and family violence on the premises at all times
- Establishing a protocol for cooperating with and receiving assistance from law enforcement
- Establishing emergency and security procedures and reviewing them with all clients and staff
- Establishing written procedures for arrivals and departures of parents and distributing them to all parents<sup>14</sup>
- Requiring all parents to have photo identification
- Using security devices such as metal detectors and video surveillance cameras<sup>15</sup>

Visitation staff should not only be made aware of all pertinent protocols and rules but they should also have annual updates and trainings on security measures, center policies, and emergency procedures.<sup>16</sup> Courts can assist centers to stay safe by educating staff on protection from abuse laws and procedures and by using their own experience and knowledge to provide guidance in establishing security protocols.

It is not enough for visitation centers to be only safe spaces for families to

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<sup>14</sup> Custodial and non-custodial parents should not have any contact during the visit. One way to avoid contact between parents is to have separate waiting areas and a 15-minute time period between the individual parents' arrivals and departures.

<sup>15</sup> See generally *Office of the Kansas Attorney General*, *supra* note 12, at 17-18 (outlining safety policies and procedures).

<sup>16</sup> *Id.*

visit. Visitation center employees need to have a strong base of knowledge and skills in working with families, particularly families affected by domestic violence. Thus, it is important for courts to assist visitation centers to incorporate appropriate training opportunities and to help to provide skilled consultants to the centers. The Supervised Visitation Network suggests that programs utilize consultants trained in mental health (child and adult), domestic violence, child abuse, substance abuse, foster care, and domestic relations to provide program support and to assist with staff education and training.<sup>17</sup> Hiring trained staff, appointing experts to an advisory board, or establishing affiliations and coalitions with outside agencies are some other ways for visitation centers to meet their needs for specialized knowledge and skills.

While the court may not be involved in training the staff on psychological and relational issues, it will need to educate the staff on domestic relations laws and procedures and on understanding supervised visitation from a legal standpoint. In addition, the court should also implement an open and continuous line of communication between itself and the visitation center staff. In doing so, the court will maintain an awareness of the center's capabilities and resources as well as the problem areas. By remaining aware of the center's strengths and weaknesses, the court will better serve the needs of the individuals and their children before it by making appropriate referrals and by incorporating the appropriate degree of specificity in its orders.

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<sup>17</sup> Supervised Visitation Network, *supra* note 12, at 17-18.

## **Appendix B: Sample Custody and Visitation Order**

SAMPLE CUSTODY and VISITATION ORDER

COMMONWEALTH OF PENNSYLVANIA

	Division	:		Docket No.	
		:			
		:			
		:			
	Plaintiff	:			
	v.	:			
		:			
		:			
	Defendant	:			

ORDER

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 200\_, after hearing [OR pursuant to the agreement of the parties] the following order is entered with respect to the child(ren):

<u>Full Name</u>	<u>Date of Birth</u>
_____	_____
_____	_____
_____	_____
_____	_____

1. Legal Custody/Parental Decision-Making. Choose one of the following options:

[ ] \_\_\_\_\_ shall have sole legal custody of the child(ren) and shall be responsible for all major decisions relating to them.

OR

[ ] The parties shall have shared legal custody and shall jointly make all major decisions relating to the child(ren).

2. Physical Custody/Parenting (choose only one for each party):

- |  |   |
|--|---|
| _____ shall have:  | [ ] No contact with the child(ren).   |
| [ ] Sole physical custody.                                     | [ ] Supervised visitation as set forth in section 2.1, subject to compliance with every condition selected in sections 3.1, 3.2, and 3.3. |
| [ ] Primary physical custody.                                  | [ ] Visitation as set forth in section 2.2 and subject to compliance with every condition selected in sections 3.1, 3.2, and 3.3.         |
| [ ] Shared physical custody as set forth in section 2.4 below. | [ ] Partial custody as set forth in section 2.3 subject to compliance with every condition selected in sections 3.1, 3.2, and 3.3.        |
|  | [ ] Shared physical custody as set forth in section 2.4 below.  |

\_\_\_\_\_ shall have:

**2.1. Supervised Visitation.** All visitation shall be supervised as follows (**select one**):

Visitation shall take place at the Family Court Nursery at 1801 Vine Street.

**OR**

Visitation shall be supervised by \_\_\_\_\_ and shall take place at the following location: \_\_\_\_\_

Supervised visitation shall begin on \_\_\_\_\_ (**specify date.**)

Supervised visitation shall occur on \_\_\_\_\_ (**specify days of week**) beginning at \_\_\_\_\_ and ending at \_\_\_\_\_ (**specify times**), except as otherwise provided in Section 4. with regard to Holidays, Birthdays, School Vacations, and Summers.

**2.2. Visitation.** All visitation shall occur in the presence of \_\_\_\_\_ in accordance with the following schedule:

Visitation shall begin on \_\_\_\_\_ (**specify date.**)

Visitation shall take place at the following location: \_\_\_\_\_

Visitation shall occur on \_\_\_\_\_ (**specify days of week**) beginning at \_\_\_\_\_ and ending at \_\_\_\_\_ (**specify times**), except as otherwise provided in Section 4. with regard to Holidays, Birthdays, School Vacations, Summers.

**2.3. Partial Custody as follows (choose one):**

Overnights permitted.

**OR**

Overnights NOT permitted.

This partial custody schedule shall begin on \_\_\_\_\_ (**specify date.**)

Partial custody shall occur according to the following schedule (**be specific as to days of the week and times of day**): \_\_\_\_\_

\_\_\_\_\_

except as otherwise provided in Section 4 with regard to Holidays, Birthdays, School Vacations, and Summers.

**2.4. Shared Physical Custody.**

The child(ren) shall spend substantial time with each party as described below:

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**3. Conditions**

**3.1 Child Safety.** The following safety rules apply (**check all that apply**):

- There shall be no firearms in the home or car or in the child(ren)'s presence during partial custody or visitation.
- The child(ren) shall at all times be secured in an age-appropriate safety restraint in the rear of any vehicle in which they ride.
- The following person(s) are a danger to the child(ren) and shall not be present during partial custody or visitation: \_\_\_\_\_

- Attendance at (and payment of associated costs of) parenting classes offered by \_\_\_\_\_

(name of program)

Written verification of registration for parenting classes shall be submitted to the court within 14 days of this order. Written verification of successful completion of these classes shall be submitted to the court within 30 days of such completion, which shall in no case be later than 90 days from the date of this order.

- Participation at (and payment of associated costs of) batterer intervention treatment offered by \_\_\_\_\_

(name of program)

Written verification of registration for treatment with the program shall be submitted to the court within 14 days of this order. Treatment with the program shall continue through completion, which shall in no case be later than 90 days from the date of this order (unless ongoing treatment is recommended by the treatment facility). Written verification of the successful completion of batterer intervention treatment must be submitted to the court within 30 days.

- Other: \_\_\_\_\_
- 
-

**3.2. Transportation.** The person(s) indicated below is responsible for transporting the child(ren) to and from partial custody or visitation:

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The child(ren) shall at all times be secured in an age-appropriate safety restraint in the rear of any vehicle in which they are transported.

**3.3. Exchanging the Child(ren).** All partial custody or visitation shall take place on time. No parent need wait more than 15 minutes after the set exchange time for the other parent to arrive, unless the parties agree otherwise. The parties are not to make any negative comments to or about each other or discuss court matters during the exchange. The following requirements apply (**check all that apply**):

There is to be no contact between the parents during the exchange of the child(ren). \_\_\_\_\_, a third party, shall be responsible for the exchange. The third party will transfer the child(ren) between parents at the visitation location and in the case of supervised visitation, will remain throughout the non-residential parent's visitation. The following procedure shall be followed:

- The party with primary physical custody shall deliver the child(ren) to this third party at least fifteen minutes prior to the designated time for commencement of the visitation and immediately leave the exchange site.
- The party with partial custody shall pick the child(ren) up no sooner than 15 minutes after the designated time for commencement of visitation.
- The reverse procedure shall take place upon the child(ren)'s return. The party with partial custody shall return the child(ren) 15 minutes prior to the designated time for the conclusion of the visitation and immediately leave the exchange site. The party with primary physical custody shall pick the child(ren) up no sooner than fifteen minutes after the designated time for the conclusion of visitation.

A neutral public location as set forth below. Examples include a police station or a public library or restaurant during its hours of operation. **Specify location:**

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Other (**specify locations for beginning and end of partial custody time**):

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**3.4. Communication with the Child(ren).** Communication with the child(ren) is permitted as follows (**check all that apply**):

- No telephoning, writing, or emailing the child(ren) unless the contact is agreed to in advance by the parent with primary physical custody.
- Unrestricted writing or e-mailing the child(ren). Each parent shall provide a contact address (and e-mail address if appropriate) to the other parent.
- Calling the child(ren) on the telephone \_\_\_\_ times per week. Each call shall take place between \_\_\_\_ .m. and \_\_\_\_ .m. Long distance telephone calls made by the child(ren) shall be paid for by the parent receiving the call. Each parent shall provide a telephone number to the other parent.
- Each party shall refrain from making derogatory or disparaging remarks about the other party in front of the children at any time.

**3.5. Access to Activities and Events.** The party with partial custody or visitation (**choose only one**):

- Shall not attend the child(ren)'s school activities and athletic events.
- OR**
- May attend the child(ren)'s school activities and athletic events.

**4. Holidays, Birthdays, School Vacations, and Summers**

**4.1 Holidays.** All holiday custody arrangements are to supersede the regular custody routine set forth above. For example, if Father has Memorial Day as his holiday a particular year, and his regular custodial weekend falls the weekend before and the weekend after Memorial Day, he will in fact be entitled to spend three weekends in a row with the children. This policy holds true for both parents. **All restrictions set forth in Sections 2 and 3 of this order shall apply. Select one method:**

- The parties shall have custody of the children on alternating holidays, alternating years. The holiday schedule begins with the first holiday after the date this order is signed. \_\_\_\_\_ (**specify party**) will have the first holiday. Holidays are to include (**check all that apply**):

- |   |   |
|---|---|
| <input type="checkbox"/> Christmas Eve          | <input type="checkbox"/> Christmas Day  |
| <input type="checkbox"/> New Year's Eve         | <input type="checkbox"/> New Year's Day |
| <input type="checkbox"/> Martin Luther King Day | <input type="checkbox"/> Easter         |
| <input type="checkbox"/> Passover               | <input type="checkbox"/> Memorial Day   |
| <input type="checkbox"/> Fourth of July         | <input type="checkbox"/> Labor Day      |
| <input type="checkbox"/> Rosh Hashanah          | <input type="checkbox"/> Yom Kippur     |
| <input type="checkbox"/> Columbus Day           | <input type="checkbox"/> Thanksgiving   |
| <input type="checkbox"/> _____                  | <input type="checkbox"/> _____          |
| <input type="checkbox"/> _____                  | <input type="checkbox"/> _____          |

**OR**

- The parties shall observe the following holiday schedule (**be specific as to exchange times, start date, and other relevant details**):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**4.2. Birthdays.** All birthday custody arrangements are to supersede the regular custody routine set forth above. **All restrictions set forth in Sections 2 and 3 of this order shall apply. Check all that apply:**

- Each party shall have custody of the child(ren) on that party's birthday.
- The party with primary physical custody shall have custody on his or her birthday.
- The parties shall spend time with the child(ren) on the children's birthdays as set forth below:

\_\_\_\_\_  
\_\_\_\_\_

**4.3. School Vacations other than Summer.** All vacation custody arrangements are to supersede the regular custody routine set forth above. **All restrictions set forth in Sections 2 and 3 of this order shall apply.** Vacations other than summer shall be handled according to the following schedule (**specify details**): \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**4.4 Summers. (select all that apply)**

- Each party shall be entitled to spend \_\_\_\_\_ uninterrupted weeks with the child(ren) during summer vacation from school, provided that 30 days' written notice is provided to the other party and that the time selected does not conflict with similar time for which the other party has already given proper notice.
- The party with primary physical custody shall be entitled to spend \_\_\_\_\_ uninterrupted weeks with the children during summer vacation from school, provided that 30 days' written notice is provided to the other party.
- No other provision in this Order shall change during the child(ren)'s summer vacation.

**Date** \_\_\_\_\_

\_\_\_\_\_  
**J.**

## **Appendix C: Model Mediation Screening Tool**

## **MODEL MEDIATION SCREENING TOOL**

### **SCREENING FOR DOMESTIC VIOLENCE AND CHILD ABUSE IN DIVORCE AND CHILD CUSTODY MEDIATION**

#### **I. PURPOSE**

This screening process is designed to identify parties or children of parties involved in divorce or custody actions for whom mediation may be inappropriate and who are exempt from mandatory mediation orientation and mediation because of abuse pursuant to 23 Pa. Cons. Stat. § 3901(c)(2).

#### **II. DOMESTIC VIOLENCE AND CHILD ABUSE EXEMPTION**

Pennsylvania Law does not permit courts to order an orientation session or mediation in a case in which either party or child of either party is or has been a subject of domestic violence or child abuse at any time during the pendency of an action for divorce or child custody or during the twenty-four months preceding the filing of any such action. 23 Pa. Cons. Stat. § 3901(c)(2).

##### **1. Information About Exception.**

The court shall provide all parties to actions for divorce and child custody with written information about the exemption from court ordered mediation orientation and mediation provided in 23 Pa. Cons. Stat. § 3901 and the potential risks involved in mediating family law disputes when domestic violence or child abuse has occurred. This information shall include the names and telephone numbers of local domestic violence organizations.

##### **2. Screening in Divorce and Custody Cases.**

Prior to ordering a case to mediation orientation or mediation, the court shall screen for domestic violence and child abuse as outlined in section III. Should screening reveal domestic violence or abuse at any time during the pendency of the case or within twenty-four months prior to the filing of the action, the court shall not order mediation orientation or mediation.

##### **3. Referral to Domestic Violence Programs.**

If domestic violence or child abuse is identified during the screening process but the abused party expresses an interest in mediation, before ordering a case to mediation orientation or mediation, the court shall refer the abused party to a domestic violence organization to discuss social and legal options and to consider whether mediation is a safe option.

#### **4. Confidentiality.**

The screening process is confidential and information about domestic violence or child abuse obtained through any part of the screening process shall not be disclosed.

#### **5. Notice to Parties.**

If it appears at any stage of the screening process, as outlined below, that the case is inappropriate for mediation, the court shall send the parties a notice informing them only that the case is inappropriate for mediation. If the case is determined not to be exempt from mediation as a result of the screening process, the court shall send a notice informing the parties of that conclusion.

### **III. DOMESTIC VIOLENCE AND CHILD ABUSE SCREENING BY THE COURT**

#### **1. Domestic Violence or Child Abuse Averred in Pleadings.**

When a party to a divorce or child custody action avers in the pleadings that domestic violence or child abuse has occurred during the pendency of an action or during the twenty-four months preceding the filing of the action, the court shall not order mediation orientation or mediation.

#### **2. Telephone Screening.**

If domestic abuse or child abuse is not averred in the pleadings, the court shall contact the parties by telephone and inform the parties of the exemption available under the law. If a party discloses abuse on the telephone and claims an exemption, the court shall not order mediation orientation or mediation. A self-disclosing statement about the existence of domestic violence or child abuse, in and of itself, is sufficient to preclude court-ordered mediation orientation or mediation. If a party discloses abuse on the phone, but expresses interest in mediation, the court shall schedule each party separately for an in-person screening to determine the capacity of the parties to mediate successfully. The court shall also refer the abused party to a domestic violence advocacy organization as described in Section II.

#### **3. Court Review.**

Prior to the entry of a court order requiring mediation orientation or mediation, court personnel must review the prior criminal history and neglect, abuse, and dependency adjudications and civil action records involving both parties to determine whether the records reflect that domestic violence or child abuse has occurred during the pendency of the action or within twenty-four months prior to the filing of the action. If the records reflect that domestic violence or child abuse has occurred within the statutory exemption period, the court shall not order the case to mediation orientation or mediation.

#### **IV. IN-PERSON SCREENING**

It is appropriate that courts as well as mediators screen parties in person to assess whether mediation is an appropriate means of resolving legal disputes. This Section describes when courts as well as mediators should conduct in-person screening. Parties should be fully and regularly informed that mediation is a voluntary process and that they may withdraw for any reason. Both the courts and mediators should use the following method and questionnaire for conducting an in-person screening.

##### **1. In-Person Screening by the Court.**

When domestic violence or child abuse has been identified through screening under Section III but the parties express an interest in mediation as a means of attempting to resolve disputes, the court shall screen the parties, separately and in person, to determine whether mediation is appropriate and whether mediation may be reasonably undertaken in a safe and equitable manner. If the court determines that the case is not appropriate for mediation, the court shall not order mediation orientation or mediation. If the parties still express an interest in mediation as a means of dispute resolution, the court shall refer the abused party to a domestic violence advocacy organization.

##### **2. In-Person Screening by Mediators.**

Court personnel may have screened the parties and not identified domestic or child abuse. There is a continuing necessity for mediators to screen for domestic violence and child abuse and to assess the appropriateness of each case for mediation, whether the parties have previously identified abuse or not. It is essential that both parties possess the requisite skills and equivalent capacity to mediate, that any mediation is conducted with established safety precautions, and that fair and safe agreements may be accomplished. Some victims of domestic violence and/or child abuse will readily talk about the violence they are experiencing or have experienced if they feel safe and supported. However, many others may not identify themselves as victims of abuse the first time an inquiry is made about violence or abuse in their lives. Victims may be willing to self-identify when they think the inquiring professional will believe their allegations, when it is safe to share, when the victim trusts the system to handle the information responsibly, and when the victim has identified the violence as abuse.

##### **a) Structure of the Screening Interview.**

- i. The person conducting the screening must be trained in domestic violence.
- ii. Undertake screenings before mediation commences.

- iii. Conduct screening of each party separately, preferably scheduled at different times or locations. Avoid interviewing one party directly after the other. Never ask parties to wait in a room together before or after a screening.
- iv. When scheduling a screening, inquire whether a party has any safety concerns about coming to the screening location. Make arrangements to respond to the safety concerns of the parties. Providing an escort for a party from and to the parking lot or public transportation may enhance safety.
- v. Conduct screenings in an environment that allows the greatest degree possible of privacy. Once a screening session begins, the session should not be interrupted.
- vi. At the election of a party, conduct screening with an attorney or an identified victim advocate present. The other party's lawyer or advocate must not be present during the screening.
- vii. Maintain a policy of strict confidentiality during the screening process. Inform each party of the policy. Assure parties that information shared during the screening will not be revealed to anyone else, except where there is a duty to warn of imminent danger of physical harm to another person or to oneself. However, information may be revealed to others with the informed, written consent of the party to whom confidentiality is owed.

**b) Guidelines for screening interview.**

- i. Observe behavior during the scheduling phone call, in the waiting room, and during the screening to pick up cues that could indicate an abusive relationship.
- ii. Explain to each party that, as a matter of routine procedure, you are required to meet with parties individually prior to any court ordered mediation orientation session and before beginning mediation.
- iii. Explain the goals and process of mediation. Make inquiries about the advocacy and negotiation skills of each party, the capacity of each to acknowledge the independent interests of the other party, the decision making practices of the relationship, and the distribution of the personal and economic resources of the parties. In addition, complete the attached questionnaire to identify practices of abuse, coercion, and threats by a party and any impact of the practices on the other. Give each party the

opportunity to express concerns about the mediation process and to assess whether mediation is an appropriate way to reach an agreement about the legal and/or parenting issues in their case.

- iv. Inform the parties and their attorneys of the policy to keep screening sessions confidential and the exceptions to that policy. Do not disclose information disclosed by any individual party during the screening process to anyone else without the party's consent.
- v. During the interview, GO SLOW! Ask questions slowly and wait for answers. Ask and explore each item in the Screening Questionnaire, below fully. Ask follow-up questions, if necessary, and note answers in the comment section. Explain to attorneys that the process will move faster if the screener proceeds without interruption.
- vi. Preface questions with reassurances to reduce awkwardness in the following way: "We know that domestic violence and child abuse are very common problems. Some of the questions that I'm going to ask you relate to that. I ask every person who I screen for the mediation orientation about the possibility of violence in their relationship with the other party who is involved in the case."
- vii. Explain to each party that the court is not permitted to mandate or refer to an orientation session or mediation in cases in which abuse has been involved. Also explain that parties may choose to attend an orientation session and/or mediation if the screener concludes that the parties have equivalent and adequate capacities to mediate, that mediation may be effectively and safely undertaken, and a fair agreement reached.
- viii. Explain also the potential impact of abuse on the ability of the parties to participate fully and fairly in mediation, the parties' right to address and have accommodated any concerns they may have about safety, and their right to terminate mediation at any time.
- ix. Do not question allegations of abuse, but seek to determine how recently the abuse occurred and both its frequency and severity. Evidence that abuse has occurred during the pendency of the action or within twenty-four months preceding the filing of an action is sufficient to determine that a mandate to mediation orientation and mediation are inappropriate.
- x. Do not mediate divorce or custody issues during the screening.



c) Screening Questionnaire.

**These screening questions are intended to identify information about violent, abusive, and intimidating conduct of either party. The parties may not recognize that these behaviors are present in their relationship. However, when patterns of abuse, coercion, threats, or intimidation are identified, these may indicate that the case is inappropriate for mediation orientation and mediation. The frequency and severity of abuse, the occurrence of abuse after separation of the couple, and the nature of the most recent abusive conduct are important factors to consider in assessing whether a couple may be appropriately and safely referred or mandated to mediation orientation or mediation.**

1. Do you have concerns about engaging in mediation as a way to resolve the legal and/or parenting disputes in your case?

No Concerns

A Few Concerns

Many Concerns

Comments:

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2. Has the other party ever acted in ways that frighten you?

Never

Sometimes

Frequently

Comments:

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If yes, recently? \_\_\_\_\_

3. Are the two of you able to talk to each other without arguing?

Never

Sometimes

Frequently

Always

Comments:

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4. Are you fearful about being in the same room with the other party?

Never                      Sometimes                      Usually                      Always

Comments:

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5. Are you able to speak your mind and express your point of view to the other party?

Never                      Sometimes                      Often                      Always

Comments:

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6. When you speak your mind and express your point of view to the other party, does the other party become angry and threatening or intimidating?

Never                      Sometimes                      Often                      Always

Comments:

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7. Has the other party ever threatened to hurt you or members of your family?

Never                      Sometimes                      Often

Comments:

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If yes, recently? \_\_\_\_\_

8. Has the other party ever destroyed your property or that of your children intentionally?

Never                      Sometimes                      Often

Comments:

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If yes, recently? \_\_\_\_\_

9. Does the other party swear or call you demeaning names during arguments?

Never                      Sometimes                      Often

Comments:

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10. Has the other party ever threatened to take your children and stop you from seeing them?

Never                      Sometimes                      Often

Comments:

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If yes, recently? \_\_\_\_\_

11. Has the other party ever threatened to hurt her/himself?

Never                      Sometimes                      Often

Comments:

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If yes, recently? \_\_\_\_\_

12. Do you ever become afraid for yourself or others based on the looks from or actions of the other party?

Never                      Sometimes                      Often

Comments:

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If yes, recently? \_\_\_\_\_

13. Has the other party ever hit, shoved, or pushed you?

Never                      Sometimes                      Often

Comments:

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If yes, recently? \_\_\_\_\_

14. If the other party has ever used physical force against you, have your children been present?

Never                      Sometimes                      Often                      Never Used Force

Comments:

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15. Have you or anyone else ever called the police because of problems in your home?

Never                      Sometimes                      Often

Comments:

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16. Have you or any family member ever sought medical treatment as a result of an injury caused by the other person?

Never                      Sometimes                      Often

Comments:

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17. Have your children ever been taken into protective custody by the police, child protection services, or the court?

Never                      Sometimes                      Often

Comments:

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18. Are you afraid that if you agree to mediation, the other person might retaliate or hurt your children because of what you say in mediation sessions?

Never                      Sometimes                      Often

Comments:

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19. Did the two of you agree about finances in your relationship?

Never                      Sometimes                      Often                      Always

Comments:

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20. Have you or the other party ever sought a Protective Order that involved the other party at any time in any place?

No                      Once                      More than Once

Comments:

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21. Have you or the other party ever been the subject of any Protective Order?

No                      Once                      More than Once

Comments:

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22. Are you afraid that there exists a possibility that the other person will not let you talk in the mediation process?

No                      Yes

Comments:

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23. Do you fear that there exists a possibility that the other party will verbally attack you at the mediation session or sometime later?

No                      Yes

Comments:

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24. Do you fear that there exists a possibility that the other person will physically attack you during the mediation or sometime later?

No                      Yes

Comments:

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#### **IV. SAFE AND INFORMED TERMINATION OF MEDIATION.**

Anytime during the course of mediation orientation or mediation, if either party opts to withdraw or the mediator finds that mediation is not safe because of domestic violence or child abuse, the mediation should be terminated in the following manner:

1. If domestic violence or child abuse is only revealed for the first time after mediation has commenced, the mediator shall interrupt the proceeding and conduct a screening of both parties separately to determine whether mediation is appropriate and whether the party who has been subject to domestic abuse understands the potential impact of abuse on that party's ability to participate in mediation fully and fairly. If the party subjected to abuse and the mediator agree that neither domestic abuse nor child abuse is an inhibiting factor, the mediation shall proceed. The mediator shall discuss and plan safety precautions with the party who has been subject to violence. If either the party subject to violence or the mediator determines that mediation is inappropriate, then it should be terminated.
2. Should mediation be terminated, the mediator should not advise the parties that the reason for termination is the presence, currently or formerly, of domestic violence or child abuse. Instead, the mediator should offer a less explicit rationale. The mediator should explain that it is not possible to continue, or that it is impossible to maintain neutrality. The mediator should emphasize that he or she is making the decision. If the parties or counsel will not accept this answer, the mediator should refer them to the supervisor of the mediation program.
3. The mediator should consult privately with the abused party to determine whether safety arrangements are necessary. If necessary, the mediator should make arrangements for the parties to leave separately, with the abused party leaving first and permitted reasonable time for departure. The mediator should consider whether to alert court security of potential for violence and arrange for escort of the abused party to transportation. The mediator should not reveal the destination or means of transportation of the abused party to the other party.
4. If possible without endangering the abused party, the mediator should provide the party with information and referrals for assistance.
5. If you have learned of a threat of imminent danger of physical harm to any person, you must inform the person who is the target of the threat or if the threat is against a child, the law may require that a referral to Child Protective Services be made.



6. The mediator should advise court security and the supervisor of the mediation program if he or she learns of a threat of imminent danger of physical harm to any person.
7. The mediator should inform the supervisor of the mediation program if he or she terminates a session due to issues relating to domestic violence or child abuse.

## **VI REFERRAL AND ASSISTANCE**

### **1. Domestic Violence Advocacy Referral.**

If a screener for mediation orientation or a mediator concludes that domestic abuse or child abuse has occurred, the abused party shall be provided with information about and referral to a domestic violence advocacy agency. The information should be provided only when the other party is not present.

### **2. Availability of Resource Information.**

Information about domestic violence and child abuse and referral for assistance should be available in the women's rest room of court and mediation facilities.

**Appendix D-1: Jeffrey L. Edleson,**  
*Problems Associated with*  
*Children's Witnessing of Domestic Violence 1999*



## Problems Associated with Children's Witnessing of Domestic Violence

Jeffrey L. Edleson, Ph.D.

Revised April 1999

Children who witness violence between adults in their homes have become more visible in the spotlight of public attention. The purpose of this document is to further an understanding of the current literature on the effects of witnessing adult domestic violence on the social and physical development of children. Out of 84 studies reporting on children's witnessing of domestic violence originally identified, 31 studies met criteria of rigorous research (see Edleson, 1999), with 18 of them comparing children who witnessed adult domestic violence to other groups of children, 12 others using multiple regression procedures to compare subjects along a continuum of violence exposure or by demographic characteristics, and one study applying qualitative research methods. The findings of these 31 studies can be divided into three major themes: (1) the childhood problems associated with witnessing domestic violence; (2) the moderating factors present in a child's life that appear to increase or decrease these problems; and (3) an evaluation of the research methods used in the studies reviewed.

### Children's Problems Associated with Witnessing Violence

Reviewed studies report a series of childhood problems statistically associated with a child's witnessing domestic violence. These problems can be grouped into the three main categories presented in more detail below: (1) behavioral and emotional; (2) cognitive functioning and attitudes; and (3) longer-term.

#### *Behavioral and emotional problems*

The area in which there is probably the greatest amount of information on problems associated with witnessing violence is in the area of children's behav-

ioral and emotional functioning. Generally, studies using the Child Behavior Checklist (CBCL; Achenbach & Edelbrock, 1983) and similar measures have found child witnesses of domestic violence to exhibit more aggressive and antisocial (often called "externalized" behaviors) as well as fearful and inhibited behaviors ("internalized" behaviors), and to show lower social competence than other children. Children who witnessed violence were also found to show more anxiety, self-esteem, depression, anger, and temperament problems than children who did not witness violence at home. Children from homes where their mothers were being abused have shown less skill in understanding how others feel and examining situations from others' perspectives when compared to children from non-violent households. Peer relationships, autonomy, self-control, and overall competence were also reported significantly lower among boys who had experienced serious physical violence and been exposed to the use of weapons between adults living in their homes.

Overall, these studies indicate a consistent finding that child witnesses of domestic violence exhibit a host of behavioral and emotional problems. A few studies have reported finding no differences on some of these measures but these same studies found significant differences on other measures.

Another aspect of the effects on children is their own use of violence. Social learning theory would suggest that children who witness violence may also learn to use it. Several researchers have attempted to look at this link between exposure to violence and subsequent use of it. Some support for this hypothesis has been found. For example, Singer et al. (1998) studied 2,245 children and teenagers and found that recent exposure to violence in the home was a significant

factor in predicting a child's violent behavior.

### ***Cognitive functioning and attitudes***

A number of studies have measured the association between cognitive development problems and witnessing domestic violence. While academic abilities were not found to differ between witnesses and other children (Mathias et al., 1995), another study found increased violence exposure associated with lower cognitive functioning (Rossman, 1998). One of the most direct consequences of witnessing violence may be the attitudes a child develops concerning the use of violence and conflict resolution. Jaffe, Wilson and Wolfe (1986) suggest that children's exposure to adult domestic violence may generate attitudes justifying their own use of violence. Spaccarelli, Coatsworth and Bowden's (1995) findings support this association by showing that adolescent boys incarcerated for violent crimes who had been exposed to family violence believed more than others that "acting aggressively enhances one's reputation or self-image" (p. 173). Believing that aggression would enhance their self-image significantly predicted violent offending. Boys and girls appear to differ in what they learn from these experiences. Carlson (1991) found that boys who witnessed domestic abuse were significantly more likely to approve of violence than were girls who had also witnessed it.

### ***Longer-term problems***

Most studies reviewed above have examined child problems associated with recent witnessing of domestic violence. A number of studies have mentioned much longer-term problems reported retrospectively by adults or indicated in archival records. For example, Silvern et al.'s (1995) study of 550 undergraduate students found that witnessing violence as a child was associated with adult reports of depression, trauma-related symptoms and low self-esteem among women and trauma-related symptoms alone among men. Witnessing violence appeared to be independent of the variance accounted for by the existence of parental alcohol abuse and divorce. In the same vein, Henning et al. (1996) found that among 123 adult women who had witnessed domestic violence as a child greater distress and lower social adjustment ex-

isted when compared to 494 non-witnesses. These findings persisted even after accounting for the effects of witnessing parental verbal conflict, being abused as a child, and level of reported parental caring.

### **Factors Influencing the Degree of Problems Associated with Witnessing Violence**

Several factors appear to moderate the degree to which a child is affected by witnessing violence. As will be seen below, a number of these factors also seem to interact with each other creating unique outcomes for different children.

### ***Abused and witnessing children***

Hughes, Parkinson and Vargo (1989) have suggested that both witnessing abuse and also being abused is a "double whammy" for children. Their study compared children who were both abused and had witnessed violence to children who had only witnessed violence and to others who had been exposed to neither type of violence. They found that children who were both abused and witnesses exhibited the most problem behaviors, the witness-only group showed moderate problem symptoms and the comparison group the least. This same pattern appears in series of other studies. Children seem to agree. In one study they indicated that the experience of being abused or both abused and a witness is more negative than witnessing adult domestic violence alone (McClosky, Figueredo & Koss, 1995).

The combination of being abused and witnessing violence appears to be associated with more serious problems for children than witnessing violence alone. Silvern, et al. (1995) found, however, that after accounting for the effects of being abused, adult reports of their childhood witnessing of interparental violence still accounted for a significant degree of their problems as children. Silvern and her colleagues caution that witnessing domestic violence may result in traumatic effects on children that are distinct from the effects of child abuse.

### ***Child characteristics***

Some findings point to different factors for boys and girls that are associated with witnessing vio-

lence. In general, boys have been shown to exhibit more frequent problems and ones that are categorized as external, such as hostility and aggression, while girls generally show evidence of more internalized problems, such as depression and somatic complaints (Carlson, 1991; Stagg, Wills & Howell, 1989). There are also findings that dissent from this general trend by showing that girls, especially as they get older, also exhibit more aggressive behaviors (for example, Spaccarelli, et al., 1994).

Children of different ages also appear to exhibit differing responses associated with witnessing violence. Children in preschool were reported by mothers to exhibit more problems than other age groups (Hughes, 1988).

Few studies have found differences based on race and ethnicity. O'Keefe's (1994) study of white, Latino, and African-American families of battered women found that all the children were viewed by their mothers as having serious emotional and behavioral problems. The only difference found between the groups was on social competence; African-American mothers rated their children more competent when compared to other mothers' ratings of their own children.

### ***Time since violent event***

The longer the period of time since exposure to a violent event the fewer effects a child experiences. For example, Wolfe, Zak, Wilson and Jaffe (1986) found more social problems among children residing in shelters than among children who had at one time in the past been resident in a shelter. The effect of the immediate turmoil may temporarily escalate child problems as observed in a shelter setting.

### ***Parent-child relationship factors***

A number of authors have discussed a child's *relationship to adult males* in the home as a key factor. Peled (1996) suggests that children's relationships with their battering fathers were confusing, with children expressing both affection for their fathers and resentment, pain and disappointment over his violent behavior.

Children's *relationships to their mothers* have also been identified as a key factor in how chil-

dren are affected by witnessing domestic violence. Some have conjectured that a mother's mental health would negatively affect a child's experience of violence but the data are conflicting. Wolfe, Jaffe, Wilson and Zak (1985) found that maternal stress statistically accounted for a large amount of child behavior problems. Another study of child witnesses of violence, however, found that mothers' mental health did not affect a child's response to violence in the home (McClosky et al., 1995).

*Family support and children's perceptions of their parental relationships* have also been identified as key parent-child variables. For example, Durant et al. (1994) found home environments to be important among the 225 urban black adolescents they studied. Adolescents exposed to community and domestic violence appeared to cope better if they lived in more stable and socially connected households.

## **Research Methods Used to Study Child Witnessing**

Interpreting this literature raises several problems based on the research methodologies applied. These include problems with definitions, samples, sources of information, measures, and research designs. Each is reviewed below. While together these flaws raise serious questions about this body of literature, these problems should not cause us to dismiss findings that are consistently replicated across different studies using different methods and samples.

### ***Definitions***

A significant problem in this body of literature is that many researchers have failed to differentiate abused children from those who are not themselves abused but who witness family violence. For example, Kolbo (1996) notes that of the 60 child witnesses he studied at a non-shelter domestic violence program all but two were also targets of violence. Some authors do not even identify the degree to which the children studied are both abused and witnessing violence. Rather, they sometimes present their data as representative of children who only witness violence. As Silvern et al. (1995) have stated, "the relationship between reported partner and child abuse should warn that research could be flawed if it is assumed that shelter

samples of children have been exposed solely to partner abuse” (p. 195).

### **Samples**

Another issue in this literature is that most studies draw on samples of children and their mothers who are located in shelters for battered women. While this research generates very important information for shelter-based programs, residing in shelters may be a very stressful point in a child’s life and not representative of his or her mental health in the long run. Not only have shelter-resident children most likely witnessed a violent event but they have also been removed from the familiar surroundings of their homes, neighborhoods and often their schools.

### **Sources of reports**

Who reports the child’s problems in a study may also skew the information we receive. Almost all of the studies reported above relied on mothers’ reports of their children’s problems. O’Brien, John, Margolin and Erel (1994) have shown that many parents report their children are unaware of violence between the adults when the children, in fact, report awareness of it. Studies that rely on the reports of only parents to define witnessing may incorrectly classify significant numbers of children as non-witnesses. Studies have also shown that in reports of other forms of maltreatment there are discrepancies between child, parent, clinician and agency ratings of problems. Sternberg, Lamb and Dawud-Noursi (1998) have found that child witnesses of violence and their parents differ significantly on the problems they report to researchers.

### **Measures**

The over-reliance on a single reporter is a theme that is carried through to the measures used in these studies. The reason “internalized” or “externalized” behavior problems are so frequently mentioned in this literature is a direct result of the repeated use of the Child Behavior Checklist as mentioned earlier. Very few investigators have ventured beyond the use of this measure of a few others such as the Trauma Symptoms Checklist and there is not currently a standardized measure developed that addresses the unique

problems experienced by children who witness violence at home. Such measures should include an assessment of a child’s perceived safety. Other variables not yet measured include disruption in child’s social support network among extended family members, school personnel and friends, the safety and effect of visitation arrangements, and the effect of changed economic factors on the child’s development.

### **Design**

A final weakness in this area of study is that most studies are correlational. As Holtzworth-Munro, Smutzler and Sandin (1997) point out, these studies only show *associations* between being a witness and some other variable such as a behavior problem. We generally speak of the effects of witnessing violence on children’s development. In reality, however, these studies reveal only an association between the variables without predicting that one variable caused the other to occur or vice versa. Many people make the assumption that finding an association is the same as finding that a particular event such as witnessing violence *caused* a child’s problems.

### **Implications**

The studies reviewed for this document provide strong evidence that children who witness domestic violence at home also exhibit a variety of behavioral, emotional, cognitive and longer-term developmental problems. Each child will experience adult domestic violence in unique ways depending on a variety of factors that include direct physical abuse of the child, his or her gender and age, the time since exposure to violence, and his or her relationship with adults in the home. 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.

These data are primarily based on samples of children living in shelters for battered women. This has been used as a criticism of these studies on the grounds that shelter residence is a time of crisis and not representative of a child’s on-going life. These data do, however, provide shelters with a much better understanding of the problems many of their resident

children may be experiencing. And despite the limitations of some individual studies cited, the number and variety of studies so far reported provide a strong basis for accepting the overall findings.

There is a danger that these data may lead some child protection agencies to more frequently define child witnessing of violence as a form of child abuse or neglect. It is not uncommon to see battered women charged with "failure to protect" their children from a batterer. Many child protection agencies continue to hold battered mothers solely responsible for their children's safety. These actions are often based on the belief that separating from a batterer will always be the safest path for the battered woman and her child.

Yet these actions on the part of the child protection system ignore the reality that the majority of assaults and murders of battered women occur after they have been separated or divorced from their perpetrator. Such actions also ignore the reality that battered mothers often make decisions about their relationships with male partners based on their judgments of what will be best for their children.

The responsibility for creating a dangerous environment should be laid squarely on the shoulders of the adult who is using violent behavior, whether or not that adult is the legal guardian of the child. Responsibility and blame should not be placed on adult survivors in the home. Holding the violent abuser responsible for ending the use of violence is the path that leads to safety for these children and their abused mothers.

It is likely that the outcomes of additional studies on this topic will be reported in the immediate future. The responses to existing and future studies should be to identify ways to provide safety to both children and any abused adults who also reside in their homes.

*Author of this document:*

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April 1997 (Revised April 1999)

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### **On-Line Resources**

Bibliography on "Children Who Witness Violence: Research & Intervention" by Jeffrey L. Edleson at <http://www.mincava.umn.edu/bibs/bibkids.htm>

Bibliography from the Project to Address Violence through Education (PAVE) at the University of Minnesota on "Young children and violence" at <http://www.cyfc.umn.edu/pave/preview.htm>

*Mothers & Children: Understanding the Links Between Woman Battering and Child Abuse* is a briefing paper by Jeffrey L. Edleson for a recent strategic planning meeting on the Violence Against Women Act at <http://www.mincava.umn.edu/papers/nij.htm>

*In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies* is a briefing paper by Susan Schechter and Jeffrey L. Edleson prepared for a Wingspread Conference of a similar title and can be found at <http://www.mincava.umn.edu/papers/wingsp.htm>

*Child Witness to Domestic Violence* is a brief paper written by Kathryn Conroy, DSW, on the effect on children of witnessing their mothers being battered at <http://www.columbia.edu/~rhm5/CHDWITDV.html>

*Children and Family Violence: The Unnoticed Victims* is a May 1994 report by Gabrielle M. Maxwell of New Zealand's Office of the Commissioner for Children at <http://www.mincava.umn.edu/papers/nzreport.htm>

An art gallery from the Domestic Abuse Project in Minneapolis of 13 images drawn by children who have witnessed violence at <http://www.mincava.umn.edu/kart.asp>



## ***In Brief: Problems Associated with Children's Witnessing of Domestic Violence***

Children frequently witness violence in their homes. Eighty-four studies of the problems associated with children's witnessing have been reported in the literature but only 31 were found to have met rigorous research design criteria and included in the review. These studies have documented multiple problems among children that are significantly associated with a child's witnessing assaults of one parent by another in the home. These problems include:

- *Psychological and emotional problems* such as aggression, hostility, anxiety, social withdrawal, and depression.
- *Cognitive functioning problems* such as lower verbal and quantitative skills and the development of attitudes supporting the use of violence.
- *Longer-term development problems* such as depression, trauma-related symptoms and low self-esteem among women and trauma-related symptoms alone among men.

These problems appear to be magnified or decreased by a number of *moderating factors* including:

- Whether or not the child has also been a victim of physical abuse
- A child's age and gender
- The amount of time that has passed since witnessing violence
- Where the child is living
- How a child perceives his or her relationship to adults in the home and the degree of perceived family support for the child

The studies in this body of literature vary greatly. There are a surprising number of well- designed studies, but a large number of others contain methodological flaws that should raise caution in interpreting their findings. These flaws include:

- *A failure to separate abused from non-abused witnesses of domestic violence*, making it difficult to determine what is associated with child abuse and what is solely associated with witnessing domestic violence.
- *Samples focusing almost exclusively on children in crisis shelters*. Collecting data primarily from children residing in battered women's shelters gives a good view of children at that point of crisis but not of children along a continuum of living arrangements and points of time since a violent event.
- *A failure to collect data from the children themselves*. Data is most often collected from adults ranging from mothers to teachers. Studies have shown children to report different effects on themselves than those reported by adults.
- *Use of measures developed for other populations* and not particularly sensitive to the issues of domestic violence.

Finally, significant numbers of children in these studies showed no negative consequences from witnessing violence. One must be careful not to assume that all children who witness domestic violence will show negative results. A careful assessment of each child is extremely important.

This *In Brief* highlights issues discussed in a longer document created by Jeffrey Edleson and is available through your state domestic violence coalition.

**Appendix D-2: John W. Fantuzzo and Wanda K. Mohr,  
*Prevalence and Effects of Child Exposure to Domestic Violence*  
In THE FUTURE OF CHILDREN (1999)**

# Prevalence and Effects of Child Exposure to Domestic Violence

John W. Fantuzzo  
Wanda K. Mohr

## Abstract

In recent years, researchers have focused attention on children who are exposed to domestic violence. Although presently there are no scientifically credible estimates of the national prevalence of children exposed to domestic violence, existing data suggest that large numbers of American children are affected. This article discusses the limitations of current databases and describes a promising model for the collection of reliable and valid prevalence data, the Spousal Assault Replication Program, which uses data collected through collaboration between police and university researchers.

Research examining the effects of childhood exposure to domestic violence is also limited by a range of methodological problems. Despite this, however, sufficient evidence from the body of studies exists to conclude that such exposure has adverse effects. The specific effects may differ depending on a host of variables, such as the children's ages, the nature and severity of the violence, the existence of other risk factors in the children's lives (for example, poverty, parental substance abuse), and whether the children are also directly physically abused. In general, childhood exposure to domestic violence can be associated with increased display of aggressive behavior, increased emotional problems such as depression and/or anxiety, lower levels of social competence, and poorer academic functioning.

A scientifically credible body of research on the prevalence and effects of childhood exposure to domestic violence is necessary to promote the development of effective interventions and to permit the proper channeling of public and private funds. This article identifies some of the steps that can be taken to build the research capacity necessary to obtain the needed data.

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**D**omestic violence seriously threatens the health and emotional well-being of children.<sup>1</sup> Yet, only recently have researchers focused on children affected by domestic violence. Although concern over battered women has been growing for nearly three decades, discussions about their children did not appear in the research literature until the 1980s. Initial writings contained primarily indirect, unscientific speculation. Important public policy documents—such as the yearbook of the Children's

Defense Fund,<sup>2</sup> the report of the U.S. Attorney General's Task Force on Domestic Violence,<sup>3</sup> and the National Crime Victimization Survey conducted by the National Institute of Justice<sup>4</sup>—do not discuss the state of knowledge concerning children exposed to domestic violence. These children have remained invisible to researchers and policymakers, at least in part, because of the absence of meaningful data concerning the nature and scope of the problem.<sup>5</sup>

Research to date indicates that children who live in households with domestic violence are at greater risk for maladjustment than are children who do not live with such violence. Yet, without accurate, reliable information about the prevalence and nature of children's exposure to domestic violence, prevention and intervention efforts cannot be designed for, and public and private resources cannot be appropriately targeted to, the affected children.<sup>6</sup> Effective responses from various societal sectors depend on the answers to several questions. First, how many children are exposed to domestic violence, and what are these children's experiences? Second, how do these traumatic events uniquely affect the course of healthy development for child victims?<sup>7</sup> Third, what factors increase the risk for, or provide protection against, the potentially deleterious effects of child exposure to domestic violence? Fourth, what types of interventions can mitigate these negative effects? Responses to these critical questions require a scientifically rigorous research agenda, leading to the development of a trustworthy database. This article analyzes the research to date on the prevalence and effects of child exposure to domestic violence, discusses the status of current knowledge, describes methodological limitations in the research, and recommends a five-phase strategy to develop a more precise research agenda.

### Defining Domestic Violence and Children's Exposure to Domestic Violence

The term "domestic violence" typically refers to violence between adult intimate partners. The range of conduct included in this term currently varies with the context within which it is used.<sup>8</sup> Clinical definitions are often broader than legal definitions. For example, one clinical source defines domestic violence as a pattern of assaultive and coercive behaviors, including physical, sexual, and psychological attacks, as well as economic coercion, that adults or adolescents use against their intimate partners.<sup>9</sup> By contrast, a model code on domestic and family violence limits its definition to acts of physical harm, including involuntary sexual acts, or the threat of physical harm.<sup>10</sup>

Several different terms have been used by researchers and others to refer to children in households with domestic violence. Early researchers spoke of these children as

either "witnesses" or "observers" of the violence. In the past five years, these terms have been replaced by "exposure" to the violence, which is more inclusive and does not make assumptions about the specific nature of the children's experiences with the violence. Exposure to domestic violence can include watching or hearing the violent events, direct involvement (for example, trying to intervene or calling the police), or experiencing the aftermath (for example, seeing bruises or observing maternal depression).<sup>11</sup>

No scientifically credible national prevalence data currently exist for child exposure to domestic violence. Estimating prevalence requires clear definitions for what constitutes domestic violence and child exposure to it, as well as ways to verify that the violence and the exposure occurred.<sup>5</sup> Although the field is in the early stages of formulating common definitions for domestic violence and child exposure to it, studies to date have not used common definitions. Differences in definitions and other research method-

ologies have resulted in substantial variability in prevalence estimates, and make it difficult to compare data across studies.

### Research on Prevalence of Child Exposure to Domestic Violence

Although no databases provide reliable prevalence estimates, research findings to date underscore that domestic violence occurs in large numbers of households with children. Existing data sources, including national crime reports and population-based surveys, are limited in a number of ways. Crime reports, though theoretically important vehicles for verifying the occurrence of domestic violence, are subject to differences in legal definitions for domestic violence, police protocols for reporting, and the training and technological sophistication of the police officer handling the call. Population-based surveys use a clear set of definitions to collect data, but are limited by their reliance on retrospective accounts of the violence by survey participants.<sup>12</sup> The Spousal Assault Replication Program, though not a national research effort, addresses some of the weaknesses of these other data sources by providing substantiated data collected by law enforcement officers, and using explicit definitions for domestic violence and child exposure to it, as well as standardized research methods. This study holds promise as a model for how the field can move toward building a more credible national prevalence database.

### National Crime Reports

Domestic violence is a crime as well as a public health problem. Criminal codes have been revised in recent years to broaden the categories of activities that are considered domestic violence and to strengthen the authority of police officers to intervene in violent or potentially violent situations. All states have passed some form of domestic violence legislation providing civil as well as criminal penalties for acts of violence within the home.<sup>13</sup> (See the article in this issue by Matthews for a discussion of such legislation.)

Since 1929, the Uniform Crime Reports (UCR) system has required local and state law enforcement authorities to aggregate the number of criminal incidents by offense

type and to report these totals to the FBI. Information on eight broad categories of crime—homicide, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson—is collected. Unfortunately, the UCR system does not provide specific information on domestic violence or detailed demographic information on victims and offenders. For example, 1997 data from Philadelphia indicated that there were 1.6 million 911 calls; approximately 200,000 indicated a possible domestic violence situation. However, the limitations of this database make it impossible to verify that these were in fact domestic violence incidents, or to distinguish the characteristics of the incidents.<sup>14</sup>

A new system, the National Incident Based Reporting System (NIBRS), was designed to provide more detailed national crime data. The NIBRS contains data on 57

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***Research findings to date underscore that domestic violence occurs in large numbers of households with children.***

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types of crimes, including domestic violence related crimes.<sup>15</sup> The crime categories that pertain to domestic violence include: (1) assault offenses (aggravated assault, simple assault, and intimidation); (2) forcible rape; (3) nonforcible rape; (4) disorderly conduct; and (5) family offenses, nonviolent. The NIBRS also collects detailed information on the particular incidents, as well as victim-offender demographics, victim-offender relationship, time and place of occurrence, weapon use, and victim injuries. Under the NIBRS, law enforcement personnel are required to use standard forms to collect information on each crime occurrence and its surrounding circumstances. This promising system does not yet provide national data on reported domestic violence crimes because it is fully operational only in Austin, Texas. In addition, NIBRS collects data only on crime victims; it does not provide information about other individuals who were nearby, or exposed to, the violent incident, unless those individuals are also victims of the crime. Only children who are physically victimized by a domestic violence incident are considered victims under this

system. Therefore, although NIBRS will contribute to knowledge about the prevalence of domestic violence, it will not provide information about the exposure of children to domestic violence.

### Population-Based Surveys

The National Family Violence Survey (NFVS) and the National Crime Victimization Survey (NCVS), national telephone surveys of representative samples of households, are currently the primary sources of information on violence between intimate adults in the United States. The NFVS, conducted in 1979 and 1987, used the Conflict Tactics Scale (CTS), an 18-item questionnaire that asks respondents to indicate the number of times in the previous year that an intimate partner committed a particular verbal or physical action against them

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***SARP findings revealed that children were present in the households of the domestic violence group at more than twice the rate they were present in comparable households in the general population.***

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during a conflict in their relationship.<sup>16</sup> The CTS measures verbal aggression and physical violence, but does not identify sexual and psychological abuse, which have been found to be very important aspects of domestic violence. The CTS has other limitations as well.<sup>17</sup> For example, the questionnaire does not inquire directly about children's exposure to the violence.

The 1987 NFVS sampled 6,000 households by telephone interviews. This survey indicated that 116 per 1,000 women reported experiencing some form of physical or verbal aggression by an intimate partner in one year, and 44 per 1,000 women reported that they had engaged in some form of physical or verbal aggression toward their male partners in that year.<sup>18</sup> Thirty-four per 1,000 women surveyed reported that they had experienced *severe* violence at the hands of their intimate male partners. Although the NFVS did not gather data on child exposure to domestic violence, survey results have been used to estimate the prevalence of child exposure to be at least 3.3 mil-

lion annually.<sup>19</sup> This figure has been cited by researchers and policymakers as if it were a fact, even though the data on which it is based are 20 years old, and the study sample did not include families with divorced parents or children under age three.<sup>20</sup>

The NCVS, conducted by the U.S. Department of Justice, is designed to provide annual estimates of crimes experienced by the public at large. Telephone survey data on the frequency, characteristics, and consequences of criminal victimization are collected from a sample of approximately 49,000 households.<sup>15</sup> The NCVS provides data on domestic violence and includes questions about whether children are living in the victim's household. Respondents are first asked if they experienced a major crime during the previous year. If they have, they are then asked for details, including household demographics and information about the perpetrator and the perpetrator's relationship to the victim, where the crime occurred, whether a weapon was used, and what actions the victim took subsequent to the crime. The household demographics specify who was living in the household at the time of the crime and the relationship of those persons to the victim. These are the only national data available to help determine if a child was present in the victim's household when domestic violence occurred. The data, however, do not describe the nature of the child's exposure to the crime. Based on these data, the NCVS reports that the annual rate in 1993 of physical attacks against women by intimate partners was 9.3 per 1,000, and that children under the age of 12 reside in slightly more than half of the affected households.<sup>15</sup>

In 1995 and 1996, the National Institute of Justice and the Centers for Disease Control and Prevention co-sponsored the National Violence Against Women Survey. A sample of 8,000 men and 8,000 women was drawn from random-digit telephone dialing to households in all 50 states and the District of Columbia.<sup>21</sup> This survey posed questions to respondents about experiences with violent victimization, using a modified version of the Conflict Tactics Scale that included items regarding physical assault as children by adult caretakers, physical assault experienced as adults, and queries about rape and stalking. Findings indicated that in the United States



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approximately 1.5 million women and 834,700 men are raped and/or physically assaulted by an intimate partner annually.

### Spousal Assault Replication Program: A Promising Approach to Data Collection

One major multicity research effort sponsored by the National Institute of Justice, the Spousal Assault Replication Program (SARP), addresses some of the weaknesses of other data sources by providing substantiated data on children exposed to family violence, collected by law enforcement officers and researchers using standard methods.<sup>5</sup> The SARP database was derived from investigations, in several U.S. cities, of carefully selected misdemeanor domestic violence cases.<sup>5</sup> These investigations represent a partnership between law enforcement and university researchers, who collected detailed information about the violent incidents, persons present in the household at the time of the incident, who placed the police call, and who else was assaulted. Data relevant to risk factors associated with domestic violence (for example, substance use and poverty) were obtained as well. A subsequent analysis of the SARP database examined information relevant to children's exposure to domestic violence and addressed the following questions: (1) Are children disproportionately represented in households with substantiated cases of adult female abuse? (2) Are

younger children disproportionately present in households in which domestic violence occurs? (3) Do other factors that pose developmental risks to children occur disproportionately in these households? (4) To what degree are children who live in households with domestic violence involved, in some way, in the incidents of violence?

Findings revealed that, in all five cities studied, children were present in the households of the domestic violence group at more than twice the rate they were present in comparable households in the general population.<sup>5</sup> In Milwaukee, Wisconsin, for example, 81% of the households in the SARP database had children present, whereas only 32% of the comparison households included children. Moreover, children under the age of five were more likely to be present in the homes in which domestic violence occurred; in Milwaukee, 48% of the SARP households with children had children under age five, whereas this was true for only 31% of the comparison households with children. Furthermore, children ages five and under were more likely than older children to be exposed to multiple incidents of domestic violence over a six-month period, and to parental substance abuse. Of the 633 children included in the Charlotte, North Carolina, data, 42% of those ages five and under had experienced multiple incidents of domestic violence, compared to 27% of the children ages 6 through 11, and



21% of the children ages 12 through 18. In Omaha, Nebraska, 14% of the children five years old or younger had experienced parental substance abuse, compared to 10% of the children ages 6 through 11, and 6% of the children ages 12 through 18. Other well-known risk factors, such as poverty, status as a single-parent household headed by a female, and a primary care provider with a low educational level, were also more likely to be present in the homes in which domestic violence occurred. For example, data from Atlanta, Georgia, revealed that

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***To date, research on the effects of child exposure to domestic violence indicates that this exposure has an adverse impact across a range of child functioning.***

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79% of the children in the SARP households were living in poverty, whereas this was true for only 16% of the children in comparison households; and 51% of the SARP households were single-parent households headed by a female, compared to 24% of the comparison families.<sup>5</sup> Overall, these data suggest that those children who are most dependent on their caregivers are most vulnerable to witnessing serious domestic violence, and are additionally threatened by a host of other developmental risk factors. These co-occurring risk factors also complicate efforts to identify the unique developmental consequences of exposure to family violence.

Many children in these violent households appeared to be involved in the abuse incidents in various ways. For example, adult victims indicated that children somehow influenced the onset of the violent incident in about 20% of the households. In the two cities that tracked the identity of the persons placing the 911 call, children were found to have placed 10% of the calls. In the two cities that recorded the co-occurrence of child physical abuse with a domestic violence incident, child abuse was present in 6% of the incidents. These findings indicate that children in households with domestic violence are not just “witnessing” a tragedy; often they are a part, or are perceived by the adults to be a part, of the incidents in some way.<sup>5</sup>

The SARP study provides a unique and promising approach to collecting data on children’s exposure to domestic violence. The collaboration between police and university researchers allows for a direct sampling of substantiated cases. The data are collected at the time of, and immediately following, the incident, thus avoiding the problems of retrospective reports. Participants are not selected from limited specialized settings like domestic violence shelters. In addition, identical data collection methods are used across cities, facilitating cross-site comparisons of data. The study is limited, however, by its focus on a small number of cities that may not have child populations generally representative of children in the United States. In addition, felony domestic violence cases were not included in the study, and there were many gaps in the data collected on children.<sup>22</sup>

### Research on the Effects of Domestic Violence on Children

Several reviews of research on the effects of domestic violence on children have been published in the past decade. Four are described here. Three of these reviews, published in 1989, 1996, and 1998, included studies that compared children exposed to domestic violence with children from nonviolent homes with respect to one or more aspects of child functioning, including: (1) externalizing behaviors (such as aggressive behavior and conduct problems); (2) internalizing behaviors (such as depression, anxiety, and low self-esteem); (3) intellectual and academic functioning; (4) social development (social competencies with peers and adults, for example); and (5) physical health and development.<sup>23,24,25</sup> The 1998 review also included research on the co-occurrence of child maltreatment and exposure to domestic violence, as well as studies that examined factors that mediate or modify child outcomes. The fourth review, completed in 1998, applies a developmental-epidemiological perspective in its analysis of the research, and sets forth important principles to guide future empirical work in the field.<sup>26</sup> To date, research on the effects of child exposure to domestic violence indicates that this exposure has an adverse impact across a range of child functioning, produces different effects at different ages, increases the risk

for child abuse, and is associated with other risk factors such as poverty and parental substance abuse. This research does not, as yet, reveal reliable information about the impact of particular types or frequencies of domestic violence on children, or how children with specific characteristics are affected across time.

### The Impact of Exposure to Domestic Violence on Child Functioning

The 1989 and 1996 literature reviews indicated that children exposed to domestic violence demonstrated more externalizing and more internalizing behaviors than did children from nonviolent homes.<sup>23,24</sup> Specifically, the studies that examined differences across groups in these behaviors revealed that children exposed to domestic violence tended to be more aggressive and to exhibit behavior problems in their schools and communities ranging from temper tantrums to fights. Internalizing behavior problems included depression, suicidal behaviors, anxiety, fears, phobias, insomnia, tics, bed-wetting, and low self-esteem. The few studies that assessed problems related to cognitive and academic functioning found differences between children from violent, versus nonviolent, homes. Children exposed to domestic violence demonstrated impaired ability to concentrate, difficulty in their schoolwork, and significantly lower scores on measures of verbal, motor, and cognitive skills.

By contrast, the findings were somewhat less clear with respect to social development. The 1989 review noted that all of the studies that examined social development found that both boys and girls from violent homes evidenced significantly lower levels of social competence, such as poorer problem-solving skills and lower levels of empathy, than did the comparison group children.<sup>23</sup> Yet, the 1996 review pointed out that 5 of 11 studies that assessed social functioning did not find a significant relationship between child exposure to violence and lower levels of social competence. The 1996 review also reported that the studies that assessed differences in physical health found no clear evidence of a causal link between exposure to domestic violence and health problems.<sup>24</sup>



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The 1998 review confirmed the conclusions of the previous reviews. In addition, studies in this review indicated that between 45% and 70% of children exposed to domestic violence are also victims of physical abuse, and that as many as 40% of child victims of physical abuse are also exposed to domestic violence.<sup>27</sup> Children in households with domestic violence were also found to be at higher risk for sexual abuse than were children in nonviolent households. In addition, studies in this review suggested that negative outcomes were more likely for children who experienced both domestic violence and child maltreatment than for children who had experienced only one form of violence or no violence. This review concluded, in fact, that the coexistence of multiple risk factors was more important in predicting problems than was the presence of any single factor alone.

Studies that examined age as a factor in mediating outcomes indicated that expo-

sure to domestic violence produced different developmental problems at different ages. The literature was inconclusive with respect to whether the child's gender in any way mediated the effects of exposure to domestic violence. Some studies found that gender made no difference, while others found that boys were more severely and negatively affected than girls. Only a few studies had investigated the effects of race or ethnicity; one found that being an African-American male predicted externalizing behavior, and another revealed that Hispanic children exposed to domestic violence had higher levels of anxiety and phobias than similar children in other ethnic groups.<sup>28</sup>

### A Developmental-Epidemiological Critique of the Research Literature

The final review included in this article used a developmental-epidemiological framework to critique 21 empirical studies that examined the effects of exposure to domestic violence on children.<sup>26</sup> This framework

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***Limited funding places a premium on the research community's ability to build capacity for high-quality research, and demands a strategic research agenda that capitalizes on existing resources.***

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combines the research methods and scientific principles from both epidemiology and developmental psychopathology. The goal of epidemiological research is to predict and prevent public health problems by using rigorous definitions for the problems and accurate assessments of their prevalence. The developmental perspective seeks to identify changes in children's functioning as they grow, and examines how children's life experiences influence child outcomes. Using the developmental approach, the impact of child exposure to domestic violence can be assessed by measuring a child's performance of age-appropriate physiological, cognitive, emotional, and social tasks.<sup>29</sup> The developmental-epidemiological framework examines children's functioning as they grow while analyzing how environmental influences affect child outcomes. Many of the studies reviewed did not use the

research methods needed to accomplish the goals of this approach. Limitations in methodology included the use of study samples that were not representative of children exposed to domestic violence, unclear definitional standards, and a lack of longitudinal designs to track child functioning across time.

### Population-Based Research Issues

Most of the reviewed studies used, as study participants, children residing in domestic violence shelters.<sup>26</sup> This population of children may not be representative of the entire population of children exposed to domestic violence. In fact, there is evidence that children who reside in shelters demonstrate different characteristics and significantly higher levels of psychological distress than those exposed to domestic violence who are not in shelters.<sup>30,31</sup> The psychological adjustment problems of children in shelters may be associated with factors particular to the shelter setting. These children have been uprooted from their homes, have been separated from other family members, and have experienced their mothers under conditions of great stress. For these reasons, conclusions about the information learned from shelter samples should not be presumed to characterize all children exposed to domestic violence.

### Definitional Issues

The current body of knowledge regarding child exposure to domestic violence does not satisfy the standards for definition and substantiation required for epidemiological research.<sup>26</sup> Many studies do not clearly define domestic violence or child exposure, nor do they typically obtain independent corroboration that the violent incident occurred. Only five studies provided definitions of child exposure to domestic violence, and they characterized it as being within auditory or visual range of physical fighting between the parents. These studies used unsubstantiated reports by the child and the mother to indicate that the child had witnessed the violence. Most of the studies used the Conflict Tactics Scale as their only independent measure of the violence. Only two studies offered official substantiation of the violence in the family; the substantiation was based on reports from child protective services. The absence of clear, consistently used definitions of child exposure, and of inde-



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pendent substantiation of exposure, makes it difficult to compare findings across studies, or to rely with assurance on the validity of reported results.

#### Child-Centered Research Issues

A majority of the studies reviewed did not demonstrate recognition of important developmental issues, including: (1) an appreciation for the whole child across multiple aspects of functioning, (2) sensitivity to the developmental stage of the child and skills appropriate for that stage, and (3) acknowledgment of the importance of tracking functioning across time. Most of the studies did not consider age as a variable in their research design; about half of the studies included only school-age children in their samples. Only three of the five studies examining multiple developmental stages looked at the differences in child outcomes as a function of age. There were no studies that used a longitudinal research design to study the impact of exposure to domestic violence across time.<sup>26</sup>

#### Other Research Issues

Most of the studies reviewed did not make any reference to a theoretical basis for the study, even though sound theoretical frameworks are essential to determining which variables are important to examine.<sup>32</sup> All of the studies comparing children exposed to domestic violence with children from non-violent homes used research designs that

require that both groups of children share common characteristics. Although most studies controlled for child age and gender, as well as socioeconomic status of the family, fewer than half controlled for other family variables such as marital status, family size, and age of the mother. Even fewer studies controlled for ethnicity, child health, or family stress. In addition, only about half of the studies had sufficient numbers of participants to detect significant differences between the study and control groups.<sup>33</sup> And, at present, research tools designed specifically to assess children exposed to domestic violence do not exist,<sup>29</sup> so studies use general psychological checklists, which may be culturally biased and unrepresentative of low-income children from highly stressed families.<sup>34,35</sup> Clearly, the field must develop standardization measures for assessing child functioning in the context of domestic violence.

#### Building Research Capacity

Increased awareness of the complexity of the problem of child exposure to domestic violence and increased demands for more precise data occur at a time of cutbacks in government intervention and basic funding for child victimization research.<sup>36</sup> Limited funding places a premium on the research community's ability to build capacity for high-quality research, and demands a strategic research agenda that capitalizes on existing resources and is based on genuine

research partnerships. The following five-phase strategy will promote the development of greater research capacity.<sup>37</sup>

In phase one of this strategy, researchers must identify existing data sets that could increase knowledge about children exposed to domestic violence.<sup>38</sup> The second phase entails the use of findings from existing data sets to forge partnerships with strategic community institutions to investigate the prevalence of children exposed to domestic violence. In the third phase, researchers must develop tracking systems that identify children exposed to domestic violence in the crime reporting process. For example, researchers in a number of cities are working with police departments to modify incident reports to include such information and to develop databases that can link arrest records, judicial decisions, and other relevant agency information.<sup>39</sup> In the fourth phase, a classification of child exposure to domestic violence must be developed, to enhance research precision.<sup>5</sup> For a single incident, information could include the type, intensity, duration, and frequency of exposure, as well as the degree of the child's physical and psychological involvement in the incident. This type of classification system would help researchers gain a more accurate assessment of the factors that are hypothesized to be most harmful to children. In the final phase, researchers must forge additional linkages with those community agencies that serve large numbers of vulnerable children to begin a dialogue with parents on violence and safety, and to establish and validate developmentally appropriate measures of child

and family functioning for low-income, urban populations. In addition, strong relationships between researchers and communities will facilitate researchers' ability to evaluate children in their natural environments, conduct longitudinal studies of multiple risk factors, and complete well-controlled outcome evaluations of treatment and prevention programs for children and families.

## Conclusion

Given the early stages of investigation of the prevalence and effects of child exposure to domestic violence, it is not surprising that there are many gaps in the knowledge base and shortcomings in the research methods. One promising research approach involves getting as "close" as possible to the incident of violence through genuine partnerships between researchers and the professionals charged with intervening when violence has occurred—that is, law enforcement personnel, domestic violence program staff, and child protective services workers. Furthermore, the methodologies of epidemiology and developmental psychopathology have much to contribute to efforts to expand the knowledge base. These perspectives provide rigorous guidelines for the methodology of future studies, while emphasizing the importance of studying children within the context of their life situations and with sensitivity to their developmental changes. These research efforts are essential in order for all child victims of domestic violence to benefit—those currently identified by service agencies and other, yet-to-be-identified children.

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**Appendix D-3: Marjory D. Fields,**  
*The Impact of Spouse Abuse on Children and  
Its Relevance in Custody and Visitation Decisions in New York*



THE IMPACT OF SPOUSE ABUSE ON CHILDREN  
AND ITS RELEVANCE IN CUSTODY  
AND VISITATION DECISIONS  
IN NEW YORK STATE

*Marjory D. Fields\**

To the memory of the Honorable Sybil Hart Kooper, late  
Associate Justice of the Appellate Division, Second Department,  
Supreme Court of the State of New York.

INTRODUCTION

New studies are continually being conducted to help us understand the complexities of family life. As the resources and information increase, so does the need for family law practitioners who understand the social and psychological implications of the legal problems they confront. This Article attempts to promote this understanding: it surveys the substantial body of scientific research relevant to the effects of wife abuse on children and it catalogues the way in which New York courts have dealt with this information.

Part I of this Article surveys the medical, psychological, and sociological literature regarding the effects of domestic violence on children. Part II examines the efficacy of programs for the treatment of domestic violence offenders. Part III discusses how New York State appellate and trial courts have viewed evidence of domestic violence--and scientific research attempting to explain it--in making child custody and visitation decisions. Based on this discussion, Part III of the Article also offers practice suggestions for family law practitioners.

I. PSYCHOLOGICAL AND SOCIOLOGICAL STUDIES

A. THE CORRELATION BETWEEN SPOUSE ABUSE AND CHILD ABUSE

Men who abuse their wives frequently abuse their children, especially as the children grow older.<sup>1</sup> Apparently, wife abusers cannot tolerate a child's independence and "they often become as possessive and intrusive into their child's life as into their wife's."<sup>2</sup> Lee Bowker, Michelle Arbitell, and Richard McFerron confirmed this pattern in an empirical study showing that men who beat their wives were also likely to beat their children.<sup>3</sup> Of the 775 women in the survey who had children with their abusive husbands, 70% reported

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<sup>1</sup> Lenore E. Walker's research reveals that although some batterers nurture rather than abuse their younger children, they abuse rather than nurture their older children. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 6 (1984).

<sup>2</sup> *Id.*

<sup>3</sup> Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 158, 162 (Kersti Yllo & Michele Bograd eds., 1988). The authors conducted in-depth interviews with 146 women volunteers, focusing on premarital and marital history, violence, and personal

that their husbands also abused their children.<sup>4</sup> Bowker, Arbitell, and McFerron believe the figure of 70% to be understated because the women who provided details of their own abuse were either reluctant to discuss child abuse or unaware that child abuse took place out of their presence.<sup>5</sup> Finally, the categories of child abuse included in the interviews and questionnaires were limited to certain physical acts and excluded child sexual abuse, neglect, and psychological neglect.<sup>6</sup>

The researchers identified other factors associated with an increased likelihood of paternal child abuse. For example, likelihood of child abuse increased with the size of the family.<sup>7</sup> In families with one child, abuse occurred 51% of the time; in families with four or more children, abuse occurred 92% of the time.<sup>8</sup> Moreover, severity of child abuse increased in direct correlation with a husband's dominance over his wife, the frequency and severity of spouse abuse, and the frequency of marital rape.<sup>9</sup> The authors concluded that the number of children, the length of the marriage, the frequency of wife beating, and the frequency of marital rape were more important than background characteristics of either spouse in predicting whether paternal child abuse occurred.<sup>10</sup>

Another researcher used in-depth interviews of women residing in shelters for battered women to study the correlation between wife abuse and child abuse.<sup>11</sup> Sociologist Jean Giles-Sims found that of the men and women who abused their children, the men did so an average of 19.9 times in the preceding year, while women were abusive an average of 4.4 times during the same period.<sup>12</sup> In follow-up interviews, Giles-Sims found that violence decreased only for those children whose mothers did not return to their violent husbands after leaving the shelters.<sup>13</sup>

In a more recent study, Evan Stark, a sociologist, and Anne Flitcraft, a physician, studied hospital records and

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strategies and resources used to end or reduce violence. The results of this study appeared in *Woman's Day* magazine, along with an announcement that additional volunteers would be needed to continue the research. The authors included in their study the first 854 questionnaires they received in response to the advertisement. *Id.* at 161-62.

The authors acknowledged that their sample was nonrepresentative because the respondents were self-selected volunteers. The researchers neither observed the subjects nor consulted collateral sources. Nevertheless, they concluded that the results were valid because "[t]he battered wives contributed vignettes that leave little doubt in our minds regarding what occurred...." *Id.* at 162.

<sup>4</sup> *Id.* Although the authors found that the child abuse in these families was less severe than the spouse abuse, the amount of violence in general is still overwhelming. *Id.*

<sup>5</sup> *Id.* at 163.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 163.

<sup>9</sup> *Id.* at 164.

<sup>10</sup> *Id.*

<sup>11</sup> Jean Giles-Sims, *A Longitudinal Study of Battered Children of Battered Wives*, 34 FAM.REL. 205 (1985).

Giles-Sims interviewed 27 battered women who sought assistance at a battered women's shelter, 21 of whom were re-interviewed 6 months later. *Id.* at 206. The interviews focused on parent-child conflicts. *Id.* at 207.

<sup>12</sup> *Id.* at 208. The study focused on "kicking, biting, punching, hitting with an object, beating up, threatening with a knife or gun, and/or using a knife or gun." The study also found that of the 27 women who were interviewed initially, 55.6% of the women stated they used at least one of the abusive tactics and 63% of the women stated their husbands used at least one of the abusive tactics. *Id.* at 207.

Giles-Sims reported that a national survey of violence in American families published in 1978 showed that abusive parents abused their children an average of 10.5 times in the preceding year. The national sample did not separate abuse by gender; however, the data indicates that the men in the Giles-Sims sample used abusive tactics more frequently than the abusive parents in the national sample.

<sup>13</sup> *Id.* at 209.

social work interviews of mothers whose children were suspected of being abused or neglected.<sup>14</sup> Their research confirmed that fathers who abuse their wives are also a threat to their children.<sup>15</sup> In about half of the cases studied, a man abused both the mother and the children.<sup>16</sup>

Another study found the correlation between spouse abuse and child abuse to be much higher than that reported by Stark and Flitcraft. Alan Rosenbaum and K. Daniel O'Leary conducted a study of ninety-two women, over half of whom were victims of spouse abuse.<sup>17</sup> The study consisted of three groups: an abused sample of fifty-two women who were self-referred victims of physical marital violence and two comparison samples.<sup>18</sup> The first comparison group consisted of twenty women randomly selected from a phone book who lived in the same socioeconomic areas as those in the abused sample.<sup>19</sup> The second comparison group included twenty women who were not abused but who lived in discordant marriages.<sup>20</sup> All of the women were asked whether they or their spouses had witnessed their fathers abusing their mothers and whether either of them had been victims of child abuse.<sup>21</sup> Rosenbaum and O'Leary concluded:

Almost 82% of the [abusive] husbands who witnessed parental spouse abuse were also victims of child abuse at the hands of one or both parents, strongly supporting the contention that children of spouse-abusing couples may be unusually vulnerable to abuse. If spouse abuse is occurring within a family, assessment for child abuse is clearly indicated.<sup>22</sup>

Literature on child abuse and neglect portrays mothers as being primarily responsible for child mistreatment.<sup>23</sup> The psychological and sociological evidence is clear, however, that in a large proportion of child abuse cases the perpetrators are male. Moreover, the presence of spouse abuse is a strong indicator that the children may be suffering physical abuse by at least one parent, most likely the father. Lawyers should be aware of this correlation and present the relevant evidence to courts in custody and visitation proceedings. Similarly, judges presented with evidence of spouse abuse should determine the extent to which child abuse is occurring.

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<sup>14</sup> Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVS. 97 (1988). Stark and Flitcraft reviewed the medical records of mothers whose children's cases were referred to the child abuse and neglect review committee at Yale-New Haven Hospital between July 1977 and June 1978. The 116 mothers were classified as battered or non-battered based on the trauma history in their records and the social data in the committee reviews. *Id.* at 103.

<sup>15</sup> *Id.* at 108. The authors found that battered wives whose children are abused generally do not have a background of violence or psychopathology. *Id.*

<sup>16</sup> *Id.* at 106.

<sup>17</sup> Alan Rosenbaum & K. Daniel O'Leary, *Children: The Unintended Victims of Marital Violence*, 51 AM. J. ORTHOPSYCHIATRY 692 (1981).

<sup>18</sup> *Id.* at 694.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The women "were [all] involved in marital therapy, either at the State University of New York at Stony Brook or one of the Suffolk County mental health centers." *Id.*

<sup>21</sup> *Id.* at 695-96.

<sup>22</sup> *Id.* at 698-99.

<sup>23</sup> Judith Martin, *Maternal and Paternal Abuse of Children*, in THE DARK SIDE OF FAMILIES 293, 293 (David Finkelhor et al. eds., 1983). Martin points out that "study of male abusive parents has been neglected." *Id.* She concludes that "[m]ore information is needed concerning virtually every quality of paternal abuse." *Id.* at 299.

## B. EMOTIONAL AND PSYCHOLOGICAL HARM TO CHILDREN CAUSED BY DOMESTIC VIOLENCE

By focusing on parental rights rather than on the best interests 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. Children suffer emotional and psychological harm not only when they are victims of abuse, but also when they witness the abuse of one parent by another and when they live in a violent home without witnessing abuse. This section reviews the studies analyzing this harm.

Numerous studies demonstrate a connection between a child's exposure to abuse in the home and that child's later development of emotional and psychological problems. A 1975 study of fifty families seen in a general medical practice in England concluded that "children who observed their parents in violent conflict reacted with antisocial behavior and psychiatric problems," and are in danger of physical harm.<sup>24</sup> Between February 1977 and March 1979, Beatrice Porter and K. Daniel O'Leary conducted a study of sixty-four children at the Psychological Center of the State University of New York at Stony Brook.<sup>25</sup> Using standardized measures of child behavior problems, their research showed "a significant relationship between marital discord and behavior problems in boys...."<sup>26</sup>

In another study, Alan Rosenbaum and K. Daniel O'Leary examined fifty-three children treated in a mental health clinic.<sup>27</sup> Using "two appropriate comparison groups" and the standardized measures of child behavior problems, they showed that 70% of the children whose mothers had been victims of spouse abuse had "Conduct Disorder" scores "above the mean for a normative sample, while 34% of the children from satisfactory marriages had scores that exceeded the normative mean."<sup>28</sup> The investigators concluded that, "although not all children of spouse-abusing couples will develop either conduct or personality problems, such children appear to have some increased vulnerability to these difficulties."<sup>29</sup>

Elaine Hilberman, a psychiatrist, and Kit Munson, a psychiatric nurse, studied sixty battered women referred to them by a medical clinic for psychiatric evaluation.<sup>30</sup> In twenty of the families the children were physically or sexually abused, or both.<sup>31</sup> The study demonstrated that "whether the children were themselves battered or were onlookers to parental violence, they were deeply affected by the climate of violence in which they lived."<sup>32</sup> Reviewing the medical charts of the children, Hilberman and Munson found that "evidence of somatic, psychological, and behavioral dysfunction was documented for a third of the 209 children, and was suspected for many more."<sup>33</sup> These problems started when the children were very young and continued through adolescence, during which boys showed aggressive behavior and girls showed increasing somatic symptoms and passivity.<sup>34</sup>

Peter Jaffe, David Wolfe, Susan Wilson and Lydia Zak published a study showing that boys who were exposed to violence between their parents and boys who were abused themselves had far greater behavioral

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<sup>24</sup> Montague B. Levine, *Interparental Violence and Its Effects on the Children: A Study of 50 Families in General Practice*, 15 MED.SCI. & L. 172, 175 (1975).

<sup>25</sup> Beatrice Porter & K. Daniel O'Leary, *Marital Discord and Childhood Behavior Problems*, 8 J.ABNORMAL CHILD PSYCHOL. 287 (1980).

<sup>26</sup> *Id.* at 292-93.

<sup>27</sup> Rosenbaum & O'Leary, *supra* note 17, at 694-95.

<sup>28</sup> *Id.* at 698.

<sup>29</sup> *Id.*

<sup>30</sup> Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460 (1978).

<sup>31</sup> *Id.* at 463.

<sup>32</sup> *Id.* These children "were witnesses to drunken rages, savage assaults, strangling, shooting, stabbing, and rape." *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

problems than a comparison group of boys from the same community who had no known exposure to family violence.<sup>35</sup> The results also showed that 90% of the boys who were abused and 75% of the boys whose parents were abused, but only 13% of the boys with no known history of family violence, had behavior problem scores significantly above the normal for the Child Behavior Checklist.<sup>36</sup>

Using the same Child Behavior Checklist, Liane Davis and Bonnie Carlson looked at sixty-six boys and girls, ages four to eleven, residing with their mothers in shelters for battered women.<sup>37</sup> These children were dislocated from their homes and witnessed violence against their mothers.<sup>38</sup> Half of the children had been abused themselves.<sup>39</sup> Davis and Carlson obtained the same results as Jaffe, Wolfe, Wilson and Zak: both witnessing violence in the home and being a victim of family violence result in significantly more behavioral problems for children than the children in the established norm.<sup>40</sup>

These results are also supported by a study using another child behavior assessment instrument. Michael Hershorn and Alan Rosenbaum selected two groups of women referred for marital therapy at community mental health clinics.<sup>41</sup> One group consisted of victims of marital violence; the second consisted of women with nonviolent but discordant marriages.<sup>42</sup> A control group from the same community was selected from the telephone book and screened for satisfactory marriages with no history of marital violence.<sup>43</sup> The study employed the Behavior Problems Checklist,<sup>44</sup> on which the women reported their children's behavior. The results were clear: children who lived in families with marital discord and marital violence had significantly more behavioral and emotional problems than children from families in which their parents had satisfactory marriages with no violence.<sup>45</sup>

Studies show that violence by one parent against another harms children even if they do not witness it.<sup>46</sup> A chaotic environment in which the mother is injured and anxious, and the father is volatile and enraged disrupts the routine and nurture children need. Children raised in these environments display stress symptoms, suffer developmental delays and somatic disorders, exhibit antisocial behavior, and have poor coping mechanisms.<sup>47</sup> They become frightened and distressed when they see the resulting bruises and abrasions.<sup>48</sup> Furthermore, children may model their parents' violent behavior.<sup>49</sup>

Not surprisingly, children who exhibit the most severe problems are those who are both witnesses and victims

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<sup>35</sup> Peter G. Jaffe et al., *Similarities in Behavioral and Social Maladjustment Among Child Victims and Witnesses to Family Violence*, 56 J.ORTHOPSYCHIATRY 142, 144-45 (1986).

<sup>36</sup> *Id.* at 145. The Child Behavior Checklist is "a well-normed instrument designed to be completed by parents, which provides individual profiles on the behavioral problems and social competencies of children aged 4 through 16." Liane V. Davis & Bonnie E. Carlson, *Observation of Spouse Abuse, What Happens to the Children?*, 2 J.INTERPERSONAL VIOLENCE 278, 282 (1987).

<sup>37</sup> Davis & Carlson, *supra* note 36, at 281.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 283.

<sup>40</sup> *Id.* at 283-87.

<sup>41</sup> Michael Hershorn & Alan Rosenbaum, *Children of Marital Violence: A Closer Look at the Unintended Victims*, 55 AM.J.ORTHOPSYCHIATRY 260, 262 (1985).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 264-65.

<sup>46</sup> See, e.g., PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 39-44 (Developmental Clinical Psychology and Psychiatry Vol. 21, 1990); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND.L.REV. 1041, 1055-58 (1991).

<sup>47</sup> JAFFE ET AL., *supra* note 46, at 67-69.

<sup>48</sup> *Id.* at 69.

<sup>49</sup> *Id.* at 56-60.

of abuse. In a study conducted by psychologist Honore Hughes, children and their mothers were asked to provide information concerning the children's feelings of anxiety, depression, and self-esteem.<sup>50</sup> Children living with their mothers in a shelter for battered women were divided by age groups and subdivided into two categories: those who had witnessed their mothers being beaten and those who had both witnessed such abuse and were abused themselves.<sup>51</sup> A comparison group was recruited through the media, and screened to exclude marital violence and child abuse.<sup>52</sup> Women in the comparison group were living with male partners and were matched demographically with the shelter mothers.<sup>53</sup>

Children who had both witnessed the abuse of their mothers and who were abused themselves had the most behavioral and emotional problems.<sup>54</sup> Children who witnessed the abuse of their mothers had fewer problems.<sup>55</sup> Children in the comparison group had the fewest problems.<sup>56</sup> Mothers' reports were consistent with those of the children.<sup>57</sup>

The harm suffered by children who witness abuse manifests itself in numerous ways, ranging from physical symptoms to behavioral problems. Sociologist Mildred Daley Pagelow surveyed and interviewed 350 battered women between 1976 and 1980.<sup>58</sup> Pagelow's study included 306 mothers who had a total of 735 children.<sup>59</sup> She found that young children who witnessed violence in their homes showed insecurity through "clinging, crying, nervousness, or demanding to know where their mothers are and what they are doing at all times. Some seem to be susceptible to minor infections, colds, sore throats, bed wetting, insomnia or fitful sleep, and frantic play activities, others passively avoid group activities and games."<sup>60</sup> These symptoms cleared up soon after they arrived at a battered women's shelter. "The safety, security, supportive and nonviolent atmosphere of shelters seems to be the most effective 'medicine' for the vast majority of the young victims of violence."<sup>61</sup> Pagelow also found that the children suffered pain, terror, and guilt because of the violence they observed.<sup>62</sup>

Agnes Wohl and Bobbie Kaufman analyzed drawings by children living in a shelter for battered women and concluded that the children suffered from serious emotional disturbances, experiencing feelings of helplessness, powerlessness, fragmentation, depression, anger, and anxiety.<sup>63</sup> "The youngsters are frightened, sometimes terrified, often confused, and insecure. Their sense of self is poorly defined and their self-esteem is pitifully low."<sup>64</sup>

Jane Pfouts, Janice Schopler, and Carl Henley studied a sample of 141 children who were not in shelters for battered women, but were from families in which child or spouse abuse was confirmed by child protective

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<sup>50</sup> Honore M. Hughes, *Psychological and Behavioral Correlates of Family Violence in Child Witnesses and Victims*, 58 AM.J.ORTHOPSYCHIATRY 77, 80 (1988).

<sup>51</sup> *Id.* at 79.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* "Criteria for inclusion consisted of a) total family income less than \$15,000 a year, b) educational level of the mother roughly high school graduate or below, c) at least one child between the ages of 4 and 12 years living at home, and d) the mother was living with a male partner." *Id.*

<sup>54</sup> *Id.* at 82 Table 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 87-88. This increased the reliability of the results. *Id.*

<sup>58</sup> Mildred Daley Pagelow, *Children in Violent Families: Direct and Indirect Victims*, in YOUNG CHILDREN AND THEIR FAMILIES 47, 54 (Shirley Hill & B.J. Barnes eds. 1982).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 59.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 60.

<sup>63</sup> AGNES WOHL & BOBBIE KAUFMAN, SILENT SCREAMS AND HIDDEN CRIES: AN INTERPRETATION OF ARTWORK BY CHILDREN FROM VIOLENT HOMES (1985).

<sup>64</sup> *Id.* at 135.

service workers.<sup>65</sup> Of twenty-five children who had witnessed their mothers being abused by their fathers, 40% suffered anxiety and 48% suffered depression.<sup>66</sup> "Fifty-three percent acted out with parents, and 60 percent acted out in their interactions with siblings."<sup>67</sup> The authors concluded:

Children who saw abuse directed toward their mothers appear to suffer somewhat more emotional turmoil and, in addition, had a tendency to model the violent behavior of their parents. This sketch of child witnesses within violent families is especially disturbing because the social workers who reported the information often understated the bystander's case. Because the importance of protecting those who are abused overshadows all other considerations, social workers usually had less contact with and less information about the children who witnessed the violence.<sup>68</sup>

The tendency of child witnesses to model violent behavior is well established. In one important study, sociologist Joan McCord kept track of 253 men who participated in a delinquency prevention program in "deteriorated urban areas of eastern Massachusetts" between 1939 and 1945.<sup>69</sup> Between 1976 and 1980, 130 of the men participating in the earlier study were interviewed.<sup>70</sup> McCord divided the men into three groups based on the way their families behaved.<sup>71</sup> "Aggressive families" were characterized by open parental conflict or physical aggression by one parent--yelling, throwing objects, or injuring someone.<sup>72</sup> "Punitive families" were those in which neither parent was generally aggressive and there was little parental conflict, but at least one of the parents used corporal punishment on the subject of the current study.<sup>73</sup> In "nonaggressive families," neither parent was aggressive, parental conflict was scarce, and corporal punishment was not present.<sup>74</sup> McCord summarized her findings as follows:

The study showed, as have many others, a tendency for aggressive families to produce criminals.

Generalized parental aggressiveness seemed more criminogenic than aggression in the form of punitive discipline.... [M]en reared in a generally aggressive atmosphere were more likely than those reared by punitive parents to be convicted for Index crimes [as juveniles as well as adults].<sup>75</sup>

These results are consistent with those of other studies discussed here. Men raised in violent homes exhibit antisocial and aggressive behavior.

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<sup>65</sup> Jane H. Pfouts et al., *Forgotten Victims of Family Violence*, SOCIAL WORK, July, 1982, at 367, 368.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Joan McCord, *Parental Behavior in the Cycle of Aggression*, 51 PSYCHIATRY 14, 16 (1988).

<sup>70</sup> *Id.* at 18. The interviewers were male and had no background information about the men. *Id.* The interviewers questioned the men about their treatment records, families, jobs, education, health, behavior, and attitudes. *Id.* Criminal records were searched for all of the men. *Id.* at 18-19.

<sup>71</sup> *Id.* Counselors collected the underlying data by visiting the men's homes twice a month and filing reports describing family behavior.

<sup>72</sup> *Id.* at 16-17.

<sup>73</sup> *Id.* at 17.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 20-21. "Index" crimes are reported by the Federal Bureau of Investigation and include larceny, auto theft, burglary, assault, attempted rape, rape, kidnapping, attempted murder, or murder. *Id.* at 18; see FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1991 (1992).

Joan McCord used the same data base to assess the long-term effects of abuse and neglect in childhood.<sup>76</sup> When McCord looked at these men forty years later, she found that "close to half (45%) of the abused or neglected boys had been convicted for serious crimes, became alcoholics or mentally ill, or had died when unusually young."<sup>77</sup> Moreover, the study suggests that child abuse and neglect tend to produce juvenile delinquency. The effects of abuse and neglect seem to be greatest among those who have aggressive parents and were aggressive themselves.<sup>78</sup>

Some children who are exposed to violence in their homes experience delayed development. In a major study of 435 battered women, Lenore Walker found that 87% of the women reported that their children were aware of the violence in their homes.<sup>79</sup> Walker cites a study that showed pre-school children suffered the most disruption from the violence and showed obvious developmental delays from living in violent homes.<sup>80</sup> Walker concluded that "children who grow up in violent homes show its effects in their overall socialization process as well as in mental health symptoms."<sup>81</sup> Walker reported in an earlier book describing battered women and their families that instead of expressing anger or acknowledging tension, children aware of family violence stare, transfixed, reacting in terror whenever they hear screaming or loud noises.<sup>82</sup> When they are older, these children report feelings of guilt because they did not attempt to intervene.<sup>83</sup> Indeed, they often believe they are the cause of the violence.<sup>84</sup>

Children exposed to parental spouse abuse exhibit negative effects which persist into their young adult years. Barbara Forsstrom-Cohen and Alan Rosenbaum, trying to develop a theory concerning the effects on children of violence by one parent against the other, interviewed college students to determine the long-term behavioral and emotional effects of viewing parental spouse abuse.<sup>85</sup> They divided the college students into three groups: students who had witnessed any physical violence by one parent against the other; students who reported marital discord but no violence by one parent against the other; and students "who characterized their parents' marriages as satisfactory and nonviolent."<sup>86</sup> All three groups were screened to exclude those who were victims of child abuse.<sup>87</sup> Forsstrom-Cohen & Rosenbaum conclude

that exposure to parental marital violence negatively affects the witnessing children, that these effects persist into young adulthood, and that males and females are differentially affected. Exposure to marital violence was associated with increased levels of anxiety for both males and females; however, only females showed elevated levels of depression and aggression.<sup>88</sup>

The researchers believed they were testing long-term rather than concurrent effects of witnessing violence

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<sup>76</sup> Joan McCord, *A Forty Year Perspective on Effects of Child Abuse and Neglect*, 7 CHILD ABUSE & NEGLECT 265 (1983).

<sup>77</sup> *Id.* at 270.

<sup>78</sup> *Id.*

<sup>79</sup> WALKER, *supra* note 1, at 59. This study was funded by the National Institute of Mental Health. *Id.* at xiii, 1-4.

<sup>80</sup> *Id.* at 63.

<sup>81</sup> *Id.* at 64.

<sup>82</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 150 (1979).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Barbara Forsstrom-Cohen & Alan Rosenbaum, *The Effects of Parental Marital Violence on Young Adults: An Exploratory Investigation*, 47 J.MARRIAGE & FAM. 467, 468 (1985).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 469.

<sup>88</sup> *Id.* at 470. Students from nonviolent but discordant homes also suffered from heightened anxiety. *Id.* Thus, the researchers concluded that "marital discord rather than the exposure to violence may have accounted for" increased anxiety. *Id.*



because the men in the study reported an average of four years and the women in the study reported an average of seven years since they last witnessed parental violence.<sup>89</sup> That the women reported witnessing violence less recently than the men did not lessen the lasting impact on women, as they "showed the most negative effects."<sup>90</sup>

Given the abundance of studies demonstrating the risk of harm facing children who are forced to remain in violent households, courts have a sound basis to protect them. Mildred Daley Pagelow concludes:

That the state should act "in the best interests of the children" is a widely accepted legal dictum. Ironically, the focus often shifts from the rights of children to nonviolent lives, to a focus on parental (paternal) rights when abused mothers attempt to separate from their abusers or to terminate their violent marriages in the hope of building violence free lives for themselves and their children.<sup>91</sup>

Certainly, there is a "a flood of reports" showing that children are aware of violence in their homes and that domestic violence is harmful both directly and indirectly.<sup>92</sup> Nevertheless, it is the practitioner's burden to move beyond allegations of domestic violence and present evidence of the danger.

## II. EFFICACY OF BATTERERS TREATMENT PROGRAMS

Many published studies indicate that educational or treatment programs for domestic violence offenders do not succeed in stopping the violence. Nevertheless, judges routinely accept a violent person's agreement to attend one of these programs as the equivalent of a ceasing of violent behavior, as proof of remorse, and as acceptance of responsibility for the violence. This section argues that, in basing their decisions on these unjustified assumptions, judges grant custody and order unsupervised visitation in situations in which violent men continue to pose a risk of harm to children and their mothers.

Most early empirical studies of wife abusers were simplistic, and cited monocausal explanations for violence: abuse in childhood, substance abuse, socioeconomic factors, personality disorders, or mental illness.<sup>93</sup> These studies offered little aid in developing an appropriate response to cases of wife abuse.<sup>94</sup> They ignored the context in which battering occurs, the perceptions and experiences of people in these situations, the family environment and dynamics of those involved, the victim's continuous terror, and the community's tolerance for family violence.<sup>95</sup>

Any useful theory of woman battering must incorporate social and familial contexts as well as the perspectives of spouses.<sup>96</sup> According to Jeffrey Edleson, Zvi Eisikovits, and Edna Guttmann, an understanding of battering and the men who batter begins with the recognition that "the most damaging and unbearable aspect of being a battered woman seems to be life in an environment where terror reigns."<sup>97</sup> Moreover, the authors argue that "

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<sup>89</sup> *Id.* at 471.

<sup>90</sup> *Id.*

<sup>91</sup> Mildred Daley Pagelow, *Adult Victims of Domestic Violence, Battered Women*, 7 J.INTERPERSONAL VIOLENCE 87, 107 (1992) [hereinafter *Adult Victims*]; see also Mildred Daley Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION Q. 347 (1990).

<sup>92</sup> *Adult Victims*, *supra* note 91, at 106.

<sup>93</sup> See, e.g., Jeffrey L. Edleson et al., *Men Who Batter Women*, 6 J.FAM.ISSUES 229, 241 (1985) (stating that the studies were "oriented toward the search for linear relationships among isolated variables and simple, monocausal explanations").

<sup>94</sup> See *id.* at 240-41.

<sup>95</sup> *Id.* at 241-44.

<sup>96</sup> *Id.* at 231 (arguing for a more comprehensive contextual study of woman battering).

<sup>97</sup> *Id.* See also WALKER, *supra* note 82 (study based on in-depth interviews with battered women); MILDRED

battering is not just overt physical and verbal behavior of a man toward a woman. It is living with a constant sense of danger and expectation of violence. These together bring about terror that is slowly constructed and eventually fills the woman's environment."<sup>98</sup>

A common misperception is that women in abusive relationships should be studied because they possess characteristics that caused them to be abused.<sup>99</sup> In a recent study evaluating potential "risk markers" of husband to wife violence, Gerald Hotaling and David Sugarman describe their search for attributes of women that make them susceptible to battering as "futile."<sup>100</sup> They stated: "There is little current evidence that women with particular personality characteristics contribute to their own victimization."<sup>101</sup>

Hotaling and Sugarman found no consistent evidence that any behaviors, attitudes, demographic characteristics, or personality traits of battered women are helpful in predicting which women will be victimized by husband or male partner violence.<sup>102</sup> Personality and symptomatic problems in women are not the cause of abuse; they are the result.<sup>103</sup> Low self-esteem, high anxiety, psychosomatic illness, and alcohol and prescription drug abuse all develop in response to chronic victimization.<sup>104</sup> As Hotaling and Sugarman observe, "the most influential victim precipitant is being female."<sup>105</sup>

Hotaling and Sugarman's study supports the theory that "[t]he victimization of women may be better understood as the outcome of male behavior."<sup>106</sup> Noting that a great majority of men who batter their wives either witnessed or experienced violence during childhood, and that spouse abusers also exhibit a broad pattern of violence against other family members and strangers, Hotaling and Sugarman conclude that the characteristics associated with male abusers offer greater utility for assessing the risk of husband to wife violence.<sup>107</sup> Understanding the cause of wife abuse requires a close examination of the male abuser.

Few studies of the characteristics of male batterers exist. The best available information regarding the likelihood of violence continuing once it has begun is from research on aggressive behavior.<sup>108</sup> Studies on aggressiveness often conclude that "once a characteristic style of aggressive responding develops, it seems to

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DALEY PAGELOW, *WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES* (1981) (study based on in-depth interviews with 350 battered women); R. EMERSON DOBASH & RUSSELL P. DOBASH, *VIOLENCE AGAINST WIVES* (1979) (study based on in-depth interviews with 109 battered wives and a review of 12,000 criminal court cases in Glasgow, Scotland).

<sup>98</sup> Edleson et al., *supra* note 93, at 231-32.

<sup>99</sup> Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 *VIOLENCE & VICTIMS* 101, 111 (1986).

<sup>100</sup> *Id.* at 120.

<sup>101</sup> *Id.* at 111.

<sup>102</sup> *Id.* at 106-11. Hotaling and Sugarman found one factor consistently associated with being a victim of spouse abuse: witnessing violence in the wife's family of origin. *Id.* at 106.

<sup>103</sup> *Id.* at 118.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 118. *Cf.* DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* 169-89 (1982) (concluding that focusing on characteristics in women is inappropriate).

<sup>107</sup> *Id.* at 119-20. Hotaling and Sugarman's research further reveals that there is no clear causal connection between psychopathology and wife beating. *Id.* at 118. Although they found studies showing that batterers have many similarities to men with borderline and antisocial personality disorders, Hotaling and Sugarman could not find "direct evidence" that wife batterers have clinical character disorders to a greater extent than typical men who do not beat their wives. *Id.*

<sup>108</sup> *See* Edleson et al., *supra* note 93, at 232-41 (surveying and criticizing some studies on aggressive behavior).

persist."<sup>109</sup> Once established, aggressive behavior remains remarkably stable across time, situations, and even generations within a family.<sup>110</sup> This research is relevant because few studies of group programs for wife batterers address the deeply entrenched nature of aggressive behavior or the extent to which threats continue after physical abuse stops.<sup>111</sup> In the context of formerly physically violent relationships, threats are sufficient to maintain an atmosphere of terror.

The results of the aggressiveness studies coupled with studies of men who completed treatment programs indicate that treatment programs for wife batterers are not successful in eliminating abuse.<sup>112</sup> Thus, courts and helping professionals have misplaced their reliance on these programs. The results of a study conducted by Adele Harrell are telling:

Contrary to expectations that treatment would reduce violence, a significantly smaller proportion of offenders in treatment programs abstained from physical aggression: the prevalence of cessation from physical aggression was 57 percent for the treated offenders, compared to 88 percent of those not ordered to treatment.<sup>113</sup>

"Threats stopped in about half (47%) of the cases, regardless of whether the offender attended treatment,"<sup>114</sup> but psychological abuse occurred at least once in all cases across the treatment period, with treated cases averaging only slightly fewer incidents of psychological abuse than non-treated cases (2.6 and 2.7 incidents per month, respectively).<sup>115</sup> Other studies support Harrell's finding that threats continue after treatment.<sup>116</sup>

Harrell also found that the victims of men who submitted to treatment programs called the police for assistance more often, both during the treatment program and in the year that followed than did the victims of men not ordered to undergo treatment.<sup>117</sup> Harrell believes this increase may be explained by a "greater willingness on the part of victims of treated offenders to seek assistance from police when subsequent incidents occurred. The court-required treatment of offenders may have convinced the victim that the police and courts were willing to act on her behalf."<sup>118</sup> These victims had proof that treatment had not worked to stop their assailants' violence. Furthermore, decreased violence by the treated men is not enough; any continued violence is sufficient to determine program failure for this group.<sup>119</sup>

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<sup>109</sup> L. Rowell Huesmann et al., *Stability of Aggression Over Time and Generations*, 20 DEVELOPMENTAL PSYCH. 1120, 1131 (1984) (22 year study of 600 subjects concluding that a child who is among the most aggressive of his peers at age eight is likely to be among the most aggressive of that group at age 30).

<sup>110</sup> *Id.* at 1133.

<sup>111</sup> Jeffrey L. Edleson & Roger J. Grusznski, *Treating Men Who Batter: Four Years of Outcome Data from the Domestic Abuse Project*, 12 J.SOC.SERVICE RES. 3, 16-21 (1988).

<sup>112</sup> *Id.* at 21-22 (suggesting that treatment programs may not be successful in permanently eliminating domestic violence).

<sup>113</sup> ADELE HARRELL, EVALUATION OF COURT-ORDERED TREATMENT FOR DOMESTIC VIOLENCE OFFENDERS 65 (1991) (Project Report, The Urban Institute, Washington, D.C.) (comparing 81 men who completed one of three group treatment programs after being ordered to do so by a court with 112 men who had been to court but were not ordered to enter treatment).

<sup>114</sup> *Id.* at Summary, 5.

<sup>115</sup> *Id.*

<sup>116</sup> See Edleson & Grusznski, *supra* note 111, at 21; L. KEVIN HAMBERGER & JAMES E. HASTINGS, SKILLS TRAINING FOR TREATMENT OF SPOUSE ABUSERS: AN OUTCOME STUDY, 128 (1988) (finding evidence of continued psychological abuse after treatment program).

<sup>117</sup> HARRELL, *supra* note 113, at Summary, 5.

<sup>118</sup> *Id.*

<sup>119</sup> See Edleson & Grusznski, *supra* note 111, at 20 (refusing to ask in follow-up interviews whether the amount of violence decreased after a husband's treatment because the authors believed that any violence after treatment was unacceptable).

Harrell was not able to identify those offenders particularly likely to benefit from treatment: "Factors previously related to spouse assault such as the offenders' history of violence, childhood exposure to violence, criminal history, alcohol or drug involvement, employment status, and marital status were not consistently related to treatment effectiveness in reducing the prevalence and frequency of violence."<sup>120</sup>

Another indication that reliance on treatment programs is unjustified is that participation in these programs improves neither victim safety (as measured by injuries to victims) nor victim perception of safety.<sup>121</sup> This lack of actual or perceived improvement in safety is foreseeable given the failure of the treated offenders to alter their normative beliefs about the use of violence against wives, as measured in post-treatment tests.<sup>122</sup> Harrell concludes that

There was no discernable deterrent effect of treatment participation, despite its educational value in conveying an understanding of the consequences of violence. This outcome suggests that offenders were well aware that the risk of facing consequences for future violence from the courts and police, as well as from acquaintances, was relatively low.<sup>123</sup>

As discussed above, evidence that treatment programs are unsuccessful abounds. Studies lauding offender treatment programs<sup>124</sup> are flawed for several reasons. Judges tend to order treatment for offenders who are "more likely to be married to the victim, less likely to have a prior criminal record, and less likely to be unemployed," because of expressed judicial views that "batterer treatment is more appropriate for first-time offenders, those with stable ties to the community, and those likely to continue in a relationship with the victim-offenders thought most likely to benefit from treatment."<sup>125</sup> These factors distort reports of treatment effects in a positive direction.<sup>126</sup> Those who are ordered to undergo treatment have support and thus a greater incentive to cease battering than those not-so ordered.

Moreover, most of these studies fail to consider the absence of violence in the follow-up period, the periodic nature of wife beating, the impact of arrest or court action, or the effect of separation from the former partner. The reported success of these programs must be questioned because the follow-up periods were often too short to account for those who are violent a few times each year or those who are temporarily without partners.<sup>127</sup> Short evaluation periods do not take into account the fact that violence varies over time and in different situations. Longer follow-up periods of two to five years may be necessary to correct for these variables.<sup>128</sup>

Arguably, treatment programs designed to stop wife beating per se are misdirected because the prevalence of physical violence toward women in most societies may lead to the conclusion that it is "normal" behavior. David Levinson analyzed anthropological studies of ninety societies to test the cross-cultural validity of the

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<sup>120</sup> HARRELL, *supra* note 113, at Summary, 7.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See, e.g.*, Edleson & Grusznski, *supra* note 111, at 21-22 (study indicating that treatment has some success in eliminating violence).

<sup>125</sup> HARRELL, *supra* note 113, at Summary, 3.

<sup>126</sup> *Id.* at Summary, 9. *See also* Huey-tyh Chen et al., *Evaluating the Effectiveness of a Court Sponsored Abuser Treatment Program*, 4 J.FAM.VIOLENCE 309, 321 (1989) (finding that empirical evidence indicates that the success of court-sponsored abuser treatment programs is far from clear).

<sup>127</sup> *See, e.g.*, Richard M. Tolman & Larry W. Bennett, *A Review of Quantitative Research on Men Who Batter*, 5 J.INTERPERSONAL VIOLENCE 87, 110-12 (1990) (noting that follow-up periods in studies often are insufficient to reveal recidivism); *cf.* Edleson & Grusznski, *supra* note 111, at 22 (arguing that any reports of threats or actual violence after treatment are unacceptable and that success of a treatment program should not depend on a statistical decrease in violence, since even sporadic violence is intolerable).

<sup>128</sup> Daniel G. Saunders, *Issues in Conducting Treatment Research with Men Who Batter*, in COPING WITH FAMILY VIOLENCE 145, 147 (Gerald T. Hotaling et al. eds., 1988).

most common theories of family violence and to identify the correlates of wife beating.<sup>129</sup> He discovered that wife beating occurs with considerable frequency in 84% of those societies.<sup>130</sup> He found that, " while no family member is entirely immune from family violence, adult women are most likely to be the victims while adult men are most likely to be the perpetrators and least likely to be the victims."<sup>131</sup> He also found that "w omen are more likely than any other category of family members to suffer severe and debilitating injuries," usually at the hands of their husbands.<sup>132</sup> Some inferred that because wife beating is so common, it must be considered normal behavior.<sup>133</sup> Why should there be a treatment program to help men cease a "normal" behavior?

Unless treatment programs address these issues and incorporate victim notification and protection into their practice, treatment programs will continue to increase the risks to battered women by creating false expectations of change and safety. These expectations can cause women to remain with or return to live with dangerous men. Children of wife batterers face similar risks. Until treatment programs improve, however, practitioners, judges, and other professionals must acknowledge that wife batterers pose a significant risk to their families even after participating in a treatment program.

### III. NEW YORK CASES AND PRACTICE SUGGESTIONS

Historically, courts have not given due weight to evidence of domestic violence when making child custody and visitation decisions.<sup>134</sup> Nevertheless it is the family law practitioner who must present compelling evidence explaining the dangers of domestic violence and its relevance to the case before the court. This Part offers suggestions for family lawyers to help them ensure that courts have the evidence concerning the effects of domestic violence when making decisions regarding child custody and visitation.

The Family Violence Project of the National Council of Juvenile and Family Court Judges proclaims that "[f]amily violence is a significant factor which must be considered when deciding custody and visitation matters."<sup>135</sup> The Project urges that supervised visitation programs should be available to everyone, not only because violence by one parent against another leads to a long-lasting emotional impact on children, but also because those who do not take responsibility for their violent behavior are likely to commit future violence.<sup>136</sup> Restriction or curtailment of visitation would protect children from continued exposure to violence against their mother's or against their father's subsequent companions or spouses as well as from direct victimization.<sup>137</sup>

Prior to 1985, there were four reported New York appellate decisions concerning the relationship between custody, visitation, and domestic violence. Since 1985, the New York appellate and trial courts have rendered thirteen decisions holding that violence by one parent against the other is relevant to the issues of custody and visitation. Although this increase shows a trend to give greater weight to evidence of domestic violence in

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<sup>129</sup> DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE (Frontiers of Anthropology Vol. 1, 1989).

<sup>130</sup> *Id.* at 82.

<sup>131</sup> *Id.* at 81.

<sup>132</sup> *Id.*

<sup>133</sup> *Cf.* R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE & SOCIAL CHANGE 4 (1992) (quoting one woman as saying, "I hid what was happening to me from everyone.... I thought I should ... accept my lot as being part of marriage....").

<sup>134</sup> In recent years, three legal commentators have criticized courts for failing to regard spouse abuse as dispositive (or even relevant) to custody and visitation determinations. See Ilona M. Besseney, *Visitation in the Domestic Violence Context: Problems and Recommendations*, 14 VT.L.REV. 57, 71- 73 (1989); Cahn, *supra* note 46; Linda R. Keenan, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L.REV. 407, 408 (1985).

<sup>135</sup> *Family Violence: Improving Court Practices*, JUV. & FAM.CT.J., 1990/Vol. 41 No. 4, at 19.

<sup>136</sup> *Id.* at 20.

<sup>137</sup> *Id.*

custody and visitation cases, lawyers must present evidence on these issues to courts.

To ensure that the courts consider the effects of domestic violence, family lawyers should provide ample evidence of any violence and its impact on the child involved. In addition to presenting physical evidence and eye witness testimony, lawyers should also use expert testimony concerning the effects of the violence on the specific child. Attorneys should also seek the appointment of law guardians to appear before the court on the children's behalf. Although some courts remain blind to issues of domestic violence in custody and visitation cases, a thorough presentation of the evidence will make it difficult for a court to ignore the issue, and will at least provide an adequate record for appeal.

#### A. EVIDENCE OF DOMESTIC VIOLENCE

Well-documented evidence of domestic violence is essential. Parties asserting a history of domestic violence bear a great burden of proof, and the pressures on women who bear this burden must be recognized.<sup>138</sup> For example battered women cannot concede that fathers are good parents and at the same time expect the court to order supervised visits only. Nevertheless, battered women frequently do so concede because they fear retaliation if they take a strong stand,<sup>139</sup> or because they hope to escape a bad situation expeditiously. [FN140] Similarly, much evidence never comes before the court because an abused woman may be humiliated and reluctant to recount the severity of the abuse she has suffered.<sup>140</sup>

To paint a picture of the atmosphere of terror and chaos in which women and children afflicted by domestic violence live, evidence of the violence and resulting physical and emotional injuries must be presented in fullest possible detail.<sup>141</sup> Descriptions of how a woman feels during and after the beating are a necessary part of this portrait. Details of children's immediate and continuing reactions to the violence are also essential.

*Blake v. Blake*<sup>142</sup> highlights the importance of presenting evidence<sup>142</sup> of physical violence. The judge in the first trial focused on the mother's failure to provide evidence to corroborate her testimony that the father had beaten her. He stated:

I have no proof that there was ever a mark on this Petitioner [the mother], and I would have to say that there would appear to be many people who would have been willing to come in and testify to any marks, had there been any, so I have to make the inference that there were no marks, and that leads me to the conclusion that the burden of proof has not been sustained as to a family offense.<sup>143</sup>

The mother testified on her own behalf, but her attorney did not call any witnesses from the battered women's shelter where the mother had been living, nor did he present the mother's hospital records. The judge consequently was unwilling to find that abuse had occurred, ignoring even the father's admission that he hit the

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<sup>138</sup> Cahn, *supra* note 46, at 1088 (arguing that "[t]here is no widespread recognition of the incidence of violence or of the pressures facing individual women who, intimidated by the batterer and the legal system, may keep evidence of violence out of the courtroom.").

<sup>139</sup> Lenore E. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, in DOMESTIC VIOLENCE ON TRIAL 127, 132 (Daniel J. Sonkin ed., 1987).

<sup>140</sup> Naomi H. Archer, *Battered Women and the Legal System*, 13 L. & PSYCHOL.REV. 145, 160 (1989)

<sup>141</sup> See *Desmond v. Desmond*, 509 N.Y.S.2d 979, 984 (Fam.Ct.1986).

<sup>142</sup> For a discussion of this terror and stress, see JAFFE ET AL., *supra* note 46, at 65 (discussing the "extremely elevated" stress in women in shelters, such as "somatic complaints, anxiety and insomnia, and depression")

<sup>143</sup> No. V-100-84 (Fam.Ct. May 2, 1984) [hereinafter *Blake I*], *rev'd and remanded*, 483 N.Y.S.2d 879 (App.Div.1984) [hereinafter *Blake II*], *on remand*, No. V-100-84 (Fam.Ct. Apr. 18, 1985) [hereinafter *Blake III*].

mother in the eye.<sup>144</sup> This admission alone could have provided a sufficient basis for the court to grant the mother an order of protection.

Regarding the custody issue, the first trial court also ignored the maternal grandmother's testimony that she had sufficient space for the mother and two children in the large home owned by the maternal grandparents.<sup>145</sup> The first trial court held that the mother "has no proper facilities" for the children, for the judge had "walked past" the shelter for battered women and did not believe it to be an adequate place to raise a child.<sup>146</sup> He further stated, "I have no testimony as to the adequacy of those facilities, and I am sure they wouldn't compare with a home."<sup>147</sup> The father testified that he lived with the children in a mobile home.<sup>148</sup> The court accepted this as better than the shelter and awarded joint custody, with physical custody to the father.<sup>149</sup>

The Appellate Division, Fourth Department, reversed this award of joint custody primarily because the Family Court failed to "conduct a full and complete hearing."<sup>150</sup> Pending a new hearing, the Appellate Division granted sole custody to the mother and "liberal visitation privileges" to the father.<sup>151</sup> It characterized the award of joint custody as inappropriate because "the parties here have demonstrated great antagonism toward each other."<sup>152</sup>

Before another judge at the second custody trial, the mother testified, presented a witness from the battered women's shelter, and introduced her medical and mental health records into evidence.<sup>153</sup> There were also reports from the Jefferson County Department of Social Services child protective unit and a law guardian.<sup>154</sup> The second trial court found that "the respondent's abusive nature would quickly have a permanent effect upon the children."<sup>155</sup>

The transcripts of the *Blake* trials demonstrate the need to "make a record" or provide "objective" evidence such as medical records, medical testimony, and third-party observation of the injuries. Even though the first trial record should have been sufficient, additional evidence was needed to overcome that court's bias against women and its reluctance to limit the fathers' contact with their children. Had the record been better at the first trial, the Appellate Division would have had a basis on which to enter its own custody decision, without ordering a second trial.

The first *Blake* trial decision illustrates the credibility problem women face when testifying about domestic violence. The first trial judge rejected the mother's testimony regarding domestic violence and ignored the father's admission that he hit the mother in the eye. This indicates that it is often necessary to inundate certain trial judges with evidence.

Appellate Division judges have recently rebuked trial courts for failing to give proper consideration to evidence of abuse. In *A.F. v. N.F.*,<sup>156</sup> the Appellate Division, Second Department, reversed the Family Court's award of custody to a father and its finding of contempt against the mother for violation of a prior visitation order for the father. The Appellate Division granted sole custody to the mother, vacated the contempt order,

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<sup>144</sup> *Blake I*, Transcript at 78.

<sup>145</sup> *Id.*

<sup>146</sup> *Blake II*, 483 N.Y.S.2d at 880.

<sup>147</sup> *Blake I*, Transcript at 83.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 53.

<sup>150</sup> *Id.* at 82.

<sup>151</sup> *Blake II*, 483 N.Y.S.2d at 880.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Blake III*, slip op. at 5, 7.

<sup>155</sup> *Id.* at 7.

<sup>156</sup> *Id.* at 6.

and remitted the case for a hearing to determine a visitation schedule for the father.<sup>157</sup> The Appellate Division noted that, prior to the Family Court custody proceeding, the mother had been granted an order of protection against the father.<sup>158</sup> The Appellate Division criticized the Family Court for failing to consider the mother's evidence of violence by the father. The appellate court stated: "While the evidence that the father has acted violently towards the mother does not automatically warrant denial of custody, this type of behavior, especially where it occurs in the presence of the child, does relate to the parties' respective abilities to assume the role of primary custodian."<sup>159</sup>

In *Keating v. Keating*,<sup>160</sup> the Appellate Division, Second Department, reversed the trial court's change of custody from the mother to the father. The Appellate Division found that the decision was contrary to all of the evidence presented to the trial court.<sup>161</sup> One specific example it cited was the trial court's failure to consider the father's assaults on the mother, stating: "Also of significance in balancing the parties' respective abilities to assume the role of primary custodian is the plaintiff's testimony that the defendant on numerous occasions had physically assaulted her."<sup>162</sup> Although the father admitted striking the mother "in the face on at least one occasion in the presence of the parties' daughter,"<sup>163</sup> and the daughter told the trial judge "that she had seen her father hit her mother many times and had noticed bruises on her body," the trial court failed to consider that this behavior could affect "the children's emotional well-being and the defendant's father's fitness to assume the role of custodial parent."<sup>164</sup> This rebuke of the trial court for ignoring domestic violence indicates the progression of New York appellate decisions from paying mild to close attention to the issue.

In addition to providing evidence of abuse, legal counsel should present other proof that the parent is dangerous and uncontrollable when making a case for denial of visitation or for supervised visitation. If the parent has violated orders of protection or visitation repeatedly, was arrested more than once, or was found in contempt of court in the past, these records should be introduced into evidence. Expert testimony should be used to establish that arrest and short-term incarceration cause many wife batterers to cease their violence, and that those who are not so deterred are more dangerous.<sup>165</sup>

Expert opinion evidence may also include research findings from the scholarly studies discussed above. Expert opinion evidence may be used to indicate that domestic violence is primarily male behavior against wives, that it is difficult to isolate the causes or predict which men will be abusive as there is no "profile" of a "wife beater" or typical personality of those who are violent toward their wives, or that spouse abuse is not the result of mental illness. Furthermore, expert opinion evidence may show that existing treatment programs have not proven effective, and, therefore, a promise to attend them cannot be equated with an assurance of safety for the woman or child.

## B. EVIDENCE OF NEGATIVE EFFECT ON THE CHILD

Providing evidence of a father's violent behavior toward a mother is not always sufficient. Some courts require a plaintiff to show that the abusive conduct had a negative effect on the child. Thus, at the beginning of the case, the family law practitioner should request the court to appoint a law guardian to represent the child. A law guardian may help provide protection for the child by countering the tendency of battered women when they testify to minimize the violence committed against them. The law guardian can present the child's wishes

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<sup>157</sup> 549 N.Y.S.2d 511 (App.Div.1989).

<sup>158</sup> *Id.* at 512-13.

<sup>159</sup> *Id.* at 513.

<sup>160</sup> *Id.* at 514.

<sup>161</sup> 538 N.Y.S.2d 286 (App.Div.), *mot. for leave to appeal dismissed*, 74 N.Y.2d 791 (1989).

<sup>162</sup> *Id.* at 288-91.

<sup>163</sup> *Id.* at 290.

<sup>164</sup> *Id.* at 291.

<sup>165</sup> *Id.*



to the court. Finally, the law guardian will have greater credibility with the court when presenting evidence of the impact of the violence on the child, and the child's fears of the violent father.

A law guardian might have provided the necessary correlation between spouse abuse and its effect on the child in *Janousek v. Janousek*,<sup>166</sup> wherein the Appellate Division, Second Department, remitted the matter for a hearing to "determine the terms and conditions of defendant's visitation and whether such visitation should be supervised."<sup>167</sup> The appellate court held that the trial court had "overreacted to defendant's conduct" during the court hearing by sua sponte modifying the divorce judgment to deny defendant father all visitation with the child.<sup>168</sup> The court stated that the appropriate action would have been to cite the defendant for contempt.<sup>169</sup>

The appellate court based the remittitur on the custodial parent's testimony that the defendant had "continually harassed" her.<sup>170</sup> She testified that "defendant made threats of violence against her and her parents, that defendant assaulted her mother causing bruises on her mother's arm and that he had threatened to kidnap the child."<sup>171</sup> The court stated: "It is well-settled that a noncustodial parent should have reasonable rights of visitation, and that the denial of such rights is such a drastic remedy that an order doing so should be based on substantial evidence that visitation would be detrimental to the welfare of the child."<sup>172</sup>

The appellate court noted that the testimony of "plaintiff [mother] indicated that defendant was very hostile to plaintiff and her parents."<sup>173</sup> The testimony "further indicated that defendant at times acted in an obnoxious and immature manner and that he had a quick temper."<sup>174</sup> In spite of this summary of the testimony, the appellate court held that "an individual's personal characteristics cannot be relied on to deny visitation, unless there is a specific finding that the individual's conduct would be detrimental to the child's welfare."<sup>175</sup>

In this case, the appellate court found that "no correlation was made between defendant's behavior toward plaintiff and her parents and his behavior toward the child."<sup>176</sup> The plaintiff herself stated that she "would have no problem with defendant's visitations if he would adhere to the schedule provided in the judgment of divorce."<sup>177</sup> The court placed great weight on this concession. No evidence was presented concerning the impact on the child of the father's conduct toward the mother and the grandparents. Without such evidence, trial and appellate courts do not have a sufficient basis on which to limit or deny visitation because of the strong preference for maintaining contact with the non-custodial parent.

Two recent trial court custody decisions demonstrate the need to present much direct and expert testimony to establish that domestic violence occurred and to show the harm or risk of harm to the children from the violent spouse. In *Antoinette M.*,<sup>178</sup> maternal grandparents seeking custody of their grandchild presented extensive evidence of violence by the father against the mother prior to the murder of the mother. At the time of the custody trial the father was a suspect in the mother's death. Psychiatrists and psychologists called by the maternal grandparents testified that the father suffered from a personality disorder and from poor self control. They opined that the father posed a risk to the child, and the court awarded custody to the maternal

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<sup>166</sup> See *Symposium on Domestic Violence*, 83 J.CRIM.L. & CRIMINOLOGY 1 (1992).

<sup>167</sup> 485 N.Y.S.2d 305 (App.Div.1985).

<sup>168</sup> *Id.* at 308.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 307.

<sup>172</sup> *Id.* at 307-08.

<sup>173</sup> *Id.* at 308 (citations omitted).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

grandparents.<sup>179</sup>

In *Sklar v. Sklar*,<sup>180</sup> the defendant mother testified that the father threatened her, pushed her, called her names on numerous occasions, and choked her on one occasion. The mother in *Sklar*, in contrast to the grandparents in *Antoinette M.*, presented no other evidence on this issue. The court ordered that the mother leave Indiana--where she had moved with the two children in order to live with the maternal grandparents and return to Brooklyn.<sup>181</sup> The court, however, never rejected the allegations of domestic violence as not being credible. Furthermore, the court made no reference to domestic violence when it listed the factors to be considered in custody determinations in the "Conclusions of Law."<sup>182</sup>

From the court's review of the facts in *Sklar*<sup>183</sup>, the mother failed to present any evidence that the father's violence harmed the children. Instead, she presented only her own testimony regarding the physical and emotional abuse she suffered. The outcome of this case shows that in addition to corroborating fact and expert opinion evidence, a party should provide the court with a trial brief describing the appellate cases. This approach shows the trial court that domestic violence is relevant to child custody and visitation as a matter of fact and as a matter of law.

These decisions turn on the strength of the evidence. Contrasting *Sklar* with *Serrano v. Serrano*<sup>184</sup> (both of which were decided by the same trial judge) makes this clear. In *Serrano*, the mother presented evidence of eighteen separate incidents of assault to show the seriousness of the violence of the father against her in the presence of the child.<sup>185</sup> Based on this evidence and expert testimony regarding the effect of the violence on the child, the court denied the father any visitation.<sup>186</sup>

In *Farkas v. Farkas*,<sup>187</sup> a 1992 decision awarding custody to the mother, a New York trial court recognized the full extent to which a father's violent behavior could affect a child. The court determined that the evidence presented was sufficient to allow it to find that the father had repeatedly beaten and harassed the mother and presented perjured testimony regarding the violence toward the mother. Thus, the court limited the father's contact with the child to letters and tapes censored by the mother.<sup>188</sup> The court stated that this procedure was the only way to ensure that the father "will not attempt to pry" the mother's address from the child.<sup>189</sup> In addition, the court determined that the mother's

ability to function effectively as a custodial parent is of critical importance to [the child]. It would not be in the best interests of the child to impose upon [the mother] a visitation schedule that she would reasonably find stressful, difficult or dangerous to her physical well-being.<sup>190</sup>

The court held that the violence against the mother endangered the child's emotional well-being, the child would witness the abuse of his mother by his father, and the father would provide a negative role model.<sup>191</sup> The court stated that "a man who engages in the physical and emotional subjugation of a woman is a dangerous role

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<sup>179</sup> N.Y.L.J., Mar. 4, 1993, at 35 (Sup.Ct.Queens County).

<sup>180</sup> *Id.*

<sup>181</sup> N.Y.L.J., Dec. 17, 1992, at 27 (Sup.Ct.Kings County).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> N.Y.L.J., Jan. 21, 1986, at 17-18 (Sup.Ct.Kings County).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 18.

<sup>187</sup> N.Y.L.J., July 13, 1992, at 31 (Sup.Ct.New York County).

<sup>188</sup> *Id.* at 32.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

model from whom children must be shielded."<sup>192</sup> This court's stance reflects a well-presented case which demonstrated the risk of harm to the child from continued domestic violence.

### C. ADDITIONAL PRACTICE SUGGESTIONS

The foregoing notwithstanding, one should avoid presenting cumulative evidence on one's direct case.<sup>193</sup> Corroborating fact witnesses may be saved for the rebuttal case. Case law must be submitted at the beginning of the trial in a memorandum of law or trial brief. Judges respect well- presented evidence and a clear and persuasive argument in favor of a party's position.

In addition, counsel whenever possible should familiarize themselves with the judges deciding their cases. Counsel should be aware of the judges' reactions during the direct and defense presentation of the case and guide themselves accordingly. By providing the necessary evidence in a manner which is pleasing to the judge, practitioners will increase the likelihood that their cases will receive thoughtful consideration and positive results.

### CONCLUSION

The cases reviewed show that New York courts will consider evidence of domestic violence in making custody and visitation decisions. The evidentiary burden to be met is a heavy one when one seeks to obtain custody of a child or to place limitations on child visitation by a parent who abuses the child's other parent. The attorney must come forward with substantial evidence to demonstrate the harsh reality of serious, repeated abuse. She must present photographs, medical records, and eyewitness testimony describing the acts of violence.

While New York appellate and trial courts will consider all the evidence and act to protect children and battered parents in making custody and visitation orders, legal issues cannot be overlooked. New York law includes a strong preference for the protection of a parent's visitation rights, even if that parent has a history of violence. This high hurdle is sometimes raised when female litigants' testimony is given diminished weight because of subtle biases regarding women's credibility that creep into the adjudication process.

A demonstrable impact on the child is an essential element in the court's determination of the best interests of the child. Eyewitness and expert testimony are needed unless the child is old enough to make his or her wishes known and has good reasons for them. An attorney or law guardian for the child should advocate the child's position and protect the child's interests. The careful lawyer must not trust or assume that the judge will make the seemingly obvious connection between spouse abuse and harm to the child; instead, she must marshal all of her evidence to present a convincing case.

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<sup>192</sup> *Id.*

<sup>193</sup> WILLIAM P. RICHARDSON, RICHARDSON ON EVIDENCE § 147 (10th ed. 1973); *Berry v. Jewish Bd. of Family & Children's Servs.*, 570 N.Y.S.2d 586, 588 (App.Div.1991) (holding that the trial court has discretion to exclude evidence as cumulative); *People v. Levy*, 589 N.Y.S.2d 1, 2 (App.Div.1992) (holding that trial court properly exercised its discretion in denying admission of evidence as cumulative); *Reome v. Cortland Memorial Hosp.*, 543 N.Y.S.2d 552, 554 (App.Div.1989).

**Appendix E:**  
**National Council of Juvenile and Family Court Judges,**  
*Navigating Custody & Visitation Evaluations in Cases with*  
*Domestic Violence: A Judge's Guide (2004, revised 2006)*

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FAMILY COURT JUDGES, FAMILY VIOLENCE DEPARTMENT

# Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide



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While there are rules of evidence to direct judges in determining who qualifies as an expert, practical resources are lacking to help judges critically review the expert testimony of child custody evaluators, determine whether the evaluator's testing methods were accurate and reliable, or tease out the biases of individual clinicians, particularly when domestic violence is involved. This publication is designed to be a practical tool for judges on how to order, interpret, and act upon child custody evaluations and includes bench cards and supplementary materials.

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# Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

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# Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

Not every case will require or need an evaluation. This tool is written primarily to help judges determine whether ordering an evaluation is appropriate and, if so, to ensure that the evaluations they order are of high quality and properly attentive to the issues raised by domestic violence. However, a pressing concern for many judges is obtaining independent information to facilitate decision making when neither the parties nor the courts can afford an evaluation or investigation.<sup>1</sup> This tool can still be helpful, enabling judges to form partial solutions in specific cases and providing ideas for system change.

## Why a Tool with a Domestic Violence Focus?



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

## Introduction

It is more likely than not, according to current research,<sup>2</sup> that judges presiding over contested custody cases will have to grapple with two related questions:

- whether one parent has been physically violent or otherwise abusive to the other, and, if so,
- how that violence or abuse should affect the court's decisions about ongoing custody and visitation arrangements.

In at least some cases, you may decide to use formal custody evaluations to assist you in answering those two questions: to frame the issues; gather the relevant evidence, analyze and synthesize it; and offer it to you in a format that will facilitate your decision making. The primary function of this tool is to help you determine whether ordering an evaluation in such a case is appropriate and, if so, how to become a more critical consumer of the evaluation—not just in cases in which there is a record of domestic violence, but also in cases in which domestic violence is alleged, or where the presence of other “red flags” raises a suspicion of domestic violence.

The quality of custody evaluations, therefore, is of critical importance. Yet, not all the experts on whom courts rely have the training and experience needed to collect the evidence adequately, evaluate it competently, or make well-supported recommendations.<sup>3</sup> This is particularly true when a case involves domestic violence.<sup>4</sup> Although it may be your experience that certain custody evaluators with whom you have worked in the past are good, it remains imperative that you critically examine *all* custody evaluation reports.

This tool will help you:

- determine whether the case is one that requires an evaluation;
- determine what the content of the evaluation should be;
- select the right person to conduct the evaluation;
- tailor the evaluation to your needs;
- critique it carefully; and
- know, at the end, whether or to what extent you can rely on the evaluator's report.

1 The functions of “evaluation” and “investigation” are discussed *infra*, beginning at p. 16.

2 Peter G. Jaffe, Claire V. Crooks & Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. & Fam. Ct. J. 57, 58 (2003) (citing several studies that highlight the prevalence of custody cases with a history of domestic violence); see also, AM. PSYCHOL. ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 100 (1994) (stating that custody and visitation disputes appear to occur more often in cases in which there is a history of domestic violence).

3 For purposes of this Guide, “evaluation” refers only to the work product of those professionals qualified to evaluate the data and form an opinion about the parties in a contested custody case based upon their training and experience. Court practice is sharply divided on the question of asking evaluators or investigators to make recommendations. However, opinion is unanimous that judges, not evaluators, make the ultimate best-interests determination.

4 See, e.g., TK Logan et al., *Child Custody Evaluations and Domestic Violence: Case Comparisons*, 17 VIOLENCE AND VICTIMS 719, 735 (Dec. 2002) (the authors state that “...this study suggests that evaluators do not appear to investigate the nature or extent of domestic violence...and more specifically, do not explore domestic violence as a way of attending to the child's safety interests”).



By becoming a more demanding consumer, you will also assist the evaluators on whom you rely to increase their expertise in this difficult work.

## Organization

In the bench cards provided here, as well as in these supplementary materials, we guide you chronologically through the process, asking with you:

- I. Is this a case that would benefit from an evaluation that includes a domestic violence focus?
- II. What should the scope of the evaluation be, and whom should I ask to conduct it?
- III. How should the final report itself be evaluated? How should I use it?

The cards and the supplemental text use an identical format, allowing you to refer easily from one to the other. **The text expands upon the information found on the cards. In order to make full use of this tool, you should read the cards first or read the supplemental text alongside the cards.**

At the end of these materials, you will also find a list of additional resources, many of them available on the Internet. The remainder of this introduction offers a context for the tool, by defining domestic violence and highlighting critical aspects of the legal and ethical framework governing any case in which domestic violence is known to be, or may be, an issue.

## How to Define Domestic Violence<sup>5</sup>

Domestic violence is complex.<sup>6</sup> For purposes of this tool, we are defining it as a pattern of assaultive and coercive behaviors that operate at a variety of levels—physical, psychological, emotional, financial, and/or sexual—that perpetrators use against their intimate partners.<sup>7</sup> The pattern of behaviors is neither impulsive nor “out of control,” but is purposeful and instrumental in order to gain compliance from or control over the victim.<sup>8</sup> The presence of domestic violence, as well as any violent or abusive behavior that does not fit this description, will always be relevant to the question of what custody or visitation arrangement will serve the best interests of any children shared by the adult parties.<sup>9</sup>

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5 For purposes of this tool, we use neutral language when referring to the abusive parent and the non-abusive parent. However, research shows that men abuse women at far higher rates than women abuse men. See BUREAU JUST. STAT., U.S. DEP'T JUST., FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1 (2005) at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf> (last visited Aug. 25, 2005) (finding that females were 84 percent of spouse abuse victims, 86 percent of victims of abuse by a boyfriend or girlfriend, and 58 percent of family murder victims). See also PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN iii – 61, iv (November 2000) (finding that women (64 percent) were significantly more likely than men (16.2 percent) to report being raped, physically assaulted, and/or stalked by a current or former intimate partner and that women who were raped or physically assaulted by a current or former intimate partner were significantly more likely to sustain injuries than men who were raped or physically assaulted by a current or former intimate partner).

6 See Loretta Frederick, Battered Women's Just. Project, *Context Is Everything* (2001) at <http://www.bwjp.org/documents/context%20is%20everything.htm> (last visited Dec. 6, 2005) (examining how people use violence in their relationships and highlighting that “[i]n order to intervene effectively in these cases, it is important to understand the complex issues of violence within intimate relationships, including the intent of the offender, the meaning of the act to the victim and the effect of the violence on the victim; the context within which any given act of violence occurred. Other relevant factors include the particulars of the incident, and how much violence, coercion, or intimidation accompanied the violent event.”)

7 This definition is derived from Anne L. Ganley, *Understanding Domestic Violence: Preparatory Reading for Trainers* in ANNE L. GANLEY & SUSAN SCHECHTER, DOMESTIC VIOLENCE: A NATIONAL CURRICULUM FOR CHILD PROTECTIVE SERVICES 1-32 (Janet Carter, et al. Ed., 1996) (pointing out that, unlike stranger-to-stranger violence, domestic violence abusers have ongoing access to the victim, especially when they share children, and can continue to exercise a great deal of physical and emotional control over the victim's daily life).

8 Ganley, *id.* at 5.

9 See, e.g., SUSAN L. KEILITZ ET AL., NAT'L CENT. FOR ST. CTS., DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS 3 (1997) (providing that by identifying domestic violence in cases, courts can help victims protect themselves through safety planning and referral to support services; ensure victims are not compelled to participate in court proceedings that may place them in further danger; and prevent abusers from manipulating their victims and the judicial process by crafting specific court orders).



In some cases, there will be a public record of violence or abuse (police reports; 911 calls; criminal, civil, or protection order case information) and private records (from medical, mental health, substance abuse, shelter, and other service providers); in many others there will be explicit allegations, including allegations of child sexual abuse,<sup>10</sup> and often counter-allegations; in still others there will be indications of disturbance in the family that may or may not, upon further investigation, be related to violence or abuse. There also exist many other collateral issues that could obscure the fact that domestic violence is present in the case. We have called these the “red flag” issues that should prompt further inquiry into the presence or absence of domestic violence. See Card I, Side 2, and accompanying supplemental material.

Domestic violence may not be easily detectible in relationships where the violence is hidden, or where most of the abuse is not physical in nature. Abusive partners can often appear charming, “in charge,” and sincere in their commitment to their families even when their behavior, if we knew it, would tell another story; partners who have suffered abuse may appear to be unreliable witnesses, often seeming to be unappealing, disorganized or emotionally unstable. The parties are likely to hold radically different perceptions of their relationship and of one another; and abusers are often motivated to deny or minimize their abusive behavior.<sup>11</sup> It is particularly important in these cases to test what the parties say against other available evidence, including patterns of assaultive and coercive behaviors in past relationships, in relationships with other family members, or in relationships outside the family. Even if none of the collateral contacts has ever witnessed the abuse or violence, the absence of witnesses to the violence or its aftermath does not conclusively prove that it did not take place. Furthermore, an absence of convictions for domestic violence or violations of restraining/protection orders does not mean that a parent is not abusive.<sup>12</sup>

## The Legal Context

In cases involving known or suspected domestic violence, as in most contested custody cases,<sup>13</sup> the court’s fundamental task is to determine specifically how and to what extent each child has been affected by what has gone on inside the family; the quality of the child’s relationship with each parent (both historically and at the present time); each parent’s capacity to meet the child’s needs; and how best to assure the child’s ongoing physical, psychological and emotional well-being.

Even when they are not themselves physically or sexually abused,<sup>14</sup> when there is violence at home children are aware of and affected by it, although often parents would prefer to think, and may say, that they are not. As a significant and growing body of research attests, exposure to physical violence at home hurts children, although the extent of that injury differs from child to child,<sup>15</sup> even within the same home. We are using the term “exposure” to signal that children are affected not only when they are present at the violent incident, but also when they hear it, see it, or see

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10 See Lundy Bancroft & Jay Silverman, *Assessing Abuser’s Risks to Children in* PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION 107 (Peter Jaffe, Linda Baker & Alison Cunningham eds., 2004) (discussing the substantial overlap between domestic violence and child sexual abuse); and Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE AND NEGLECT 151-163 (1990) (underscoring the need to take child sexual abuse allegations seriously).

11 See AM. PSYCHOL. ASS’N. *supra* note 2, at 40 (stating that custody and visitation provide domestic violence abusers with an opportunity to continue their abuse, and that such abusers are twice as likely to seek sole physical custody of their children and more likely to dispute custody if there are sons involved).

12 See Etiony Aldarondo & Fernando Mederos, *Common Practitioners’ Concerns About Abusive Men*, in PROGRAMS FOR MEN WHO BATTER: INTERVENTION AND PREVENTION STRATEGIES IN A DIVERSE SOCIETY 2-4 (Etiony Aldarondo & Fernando Mederos eds., 2002) (hereinafter PROGRAMS FOR MEN WHO BATTER) (stating that many physically abusive men are never arrested or brought to trial even though they have a long history of violence toward a partner).

13 When we use “custody” in this tool, we include *both* sole or joint physical custody *and* sole or joint legal custody.

14 *But see* Red Flag Cases, *infra* p. 14 (regarding the significant overlap of child maltreatment and domestic violence). See also Bancroft & Silverman, *supra* note 10.

15 See PETER G. JAFFE, NANCY K.D. LEMON & SAMANTHA E. POISSON, CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 21-28 (2003); see also, Jeffrey L. Edleson, *Problems Associated with Children’s Witnessing of Domestic Violence* (April 1997, revised April 1999) at [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_witness.pdf](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_witness.pdf) (last visited Dec. 6, 2005).



or feel the aftermath—such as a parent injured or in distress, furniture knocked over, things broken, blood on the wall or floor. They are affected, too, when they are forced to live in an atmosphere of threat and fear created by violence. And they are affected by a parent's use of abusive behaviors that stop short of physical violence, whether those behaviors are directed primarily toward a partner, or characterize the abusive parent's relationships with partner and children alike.<sup>16</sup>

This is why judges are now almost universally under a statutory obligation to consider domestic violence as a factor when determining the best interests of children. It is why many judges are under a statutory obligation to presume that a perpetrator of domestic violence is not someone who should be given either joint or sole physical or legal custody of a child or be given unrestricted visitation with the child.<sup>17</sup> The definitions of "domestic violence" underlying these specific statutory obligations may be narrower, and more focused on physical violence, than the broader definition we have proposed. But because domestic violence in the broader sense hurts children, it is incumbent on judges in custody or visitation decisions based on the best interests of a child, regardless of particular statutory obligations, to have an accurate picture of the violence or abuse perpetrated by one parent against the other or against a child, *and* to consider its implications for the child after the parents separate. It is also important to understand that the impact of domestic violence on children may be mitigated by certain protective factors, such as a supportive relationship with the non-abusive parent.<sup>18</sup>

## The Ethical Context: Safety First<sup>19</sup>

When you make a determination or approve a parental agreement about custody and visitation, you are trying to create an environment in which children are more likely to flourish, both physically and emotionally. The emotional and physical safety of the children and an abused parent must be a paramount consideration. Children do not flourish if they are not, or do not perceive themselves to be, safe or if they perceive a parent to be at risk. Abused parents must be assured of their own safety, to the greatest extent possible, so that they in turn can provide a safe and secure environment for their children.

Cases involving domestic violence can create acute risks for an abused parent and his or her children; and we cannot determine with any certainty, especially at the outset, exactly which case, or which circumstances, contain or create those risks. Contrary to earlier thinking, in many cases, separation increases, rather than reduces, the risks of harm to an abused parent or to the children.<sup>20</sup> Physical, sexual, or emotional abuse or threats of abuse of the children post-separation may be a powerful tool in the abuser's continuing control over the other parent. Lethal violence occurs more

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16 See, e.g., JAFFE, LEMON, & POISSON, *id.* at 30-31 (discussing batterers as role models and how they often undermine the non-abusive parent's authority); see also LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2002).

17 See, e.g., LA. REV. STAT. ANN. § 9:364 (creating a rebuttable presumption against awarding sole or joint custody to a parent who has a history of perpetrating family violence; identifying factors to overcome presumption; and restricting visitation to only supervised if such a finding is made) and TEX. FAM. CODE ANN. § 153.004 (creating a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child). See also, NAT'L COUNCIL JUV. & FAM. CT. JUDGES, *MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE* §§ 401-403 (1994) [hereinafter *MODEL CODE*] (creating a rebuttable presumption against sole or joint physical or legal custody to an abusive parent (401), requiring the safety and well-being of the child and the victim be a primary consideration for the court (402), and creating a rebuttable presumption that it is in the best interest of the child to reside with the non-violent parent in a location of that parent's choice, within or outside the state (403)). For a list of those states that have enacted a rebuttable presumption against custody or visitation to an abusive parent, contact the Resource Center on Domestic Violence: Child Protection and Custody at (800) 527-3223.

18 See JAFFE, LEMON, & POISSON, *supra* note 15, at 27-28 (providing a table that identifies risk and protective factors in domestic violence cases and stating that domestic violence should be a fundamental consideration in determining the best interests of children).

19 When we speak of safety, we are including both physical and emotional safety.

20 Walter S. DeKeseredy, McKenzie Rogness & Martin D. Schwartz, *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge*, 9 *AGGRESSION & VIOLENT BEHAV.* 675 (2004), available at <http://www.ncdsv.org/images/Separationdivorcesexualassault.pdf> (last visited Dec. 6. 2005).





often during and after separation than when the couple is still together,<sup>21</sup> and children often become the targets of or witnesses to this violence.

**It may be helpful to think about three contexts in which concerns about safety can be addressed:**

- At the outset of the case, if an existing record or allegations of violence prompt immediate concern about the safety of one or both of the parties or their children. This is addressed on Card I.
- During the litigation and evaluation process, which can (a) create its own risks, and (b) uncover information that triggers immediate concern about the safety of a party or the children. This is addressed on Cards II and IIA.
- In framing final custody and visitation orders, which must ensure the ongoing safety of the parties and their children. This is addressed on Card III.

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<sup>21</sup> See Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 AM. J. PUB. HEALTH 1089-97 (2003); see also DeKeseredy, Rogness & Schwartz, *id.* at 676 and JAFFE, LEMON, & POISSON, *supra* note 15, at 8.

# Ordering an Evaluation: When Is Domestic Violence Expertise Necessary?

## What If There Are No Resources for an Evaluation?

As Card I suggests, this tool offers you a checklist of information that will be important to your decision making in any case in which domestic violence is known, alleged, or suspected. If you determine that an evaluation is necessary and if neither the parties nor the court has the resources to provide for one, or if a qualified evaluator for a domestic violence case is not available, it may still be possible for you to request that information from the parties' attorneys, from the parties themselves if they are unrepresented, and sometimes directly from the source. Child abuse/protection reports, criminal records, and records of other relevant court activity may fall into the latter category.

The tool may also help you determine which avenues of inquiry are the most crucial, and how to maximize the productivity of an inquiry, so that if you have resources for a limited evaluation, you can allocate those resources effectively. Even this limited evaluation, assuming it is informed by the appropriate domestic violence expertise, can add critical information, supplementing that which is available from the parents and enabling you to make a more appropriate decision with limited resources.

If you order a limited inquiry, it will be important to ensure that the evaluator's conclusions or recommendations do not presume more knowledge than the limited inquiry has in fact produced. For example, children might be "well behaved" in the presence of the abusive parent and "act out" in the presence of the non-abusive parent for a number of reasons not readily apparent to or understood by the evaluator. The opposite could also be true if the children feel safe with a third party present. Therefore, it is critical that evaluators understand the context within which their inquiry takes place and for you to frame the inquiry carefully and to use your authority to make relevant collateral resources available to the evaluator. This may be especially crucial in cases where the parties are unrepresented and have a limited capacity to address effectively any negative conclusions drawn by the evaluator. Exercising critical judgment in your reading of an evaluator's report is a topic addressed extensively on Card III and the accompanying supplemental material.

## Is There a Need for an Emergency/Interim Assessment?

If a case seems dangerous from the outset, and if the situation has not already been stabilized, you may need to take immediate action.

In framing temporary orders, you may want to draw on an interim safety assessment performed by a qualified expert—in other words, an interim evaluation with a limited and specific focus on safety. The expert asked to conduct this type of evaluation must be someone with specific expertise and experience in domestic violence and risk assessment.<sup>22</sup>

Research into domestic violence homicides underscores the fact that our ability to measure risk is still quite imperfect. This in itself suggests that caution is advisable. However, the research does provide some valuable guidance, and suggests the following areas of inquiry as most important for an emergency/interim safety assessment:

- the abusive partner's employment status, paying particular attention to voluntary unemployment or underemployment as well as involuntary unemployment (unemployment is the most significant socio-demographic risk factor);
- whether the abusive partner has access to firearms, has made previous threats with a weapon, or has previously threatened to kill;

- whether the abusive partner has threatened or attempted suicide;
- whether the abusive partner has a history of alcohol/drug abuse;
- the level of control exercised by the abusive partner: the more controlling a partner has been in the relationship, the greater the risk created by a separation;
- whether there is a child in the home who is not the abusive partner's biological child;
- whether the abusive parent is excessively jealous of the non-abusive parent, including being jealous of any new relationships of the non-abusive parent; and/or
- whether there have been incidents of violence or threatening behavior since the separation.<sup>23</sup>

## Once Safety Is Assessed and If Resources Are Available, Should I Order an Evaluation?

### The Clearest Cases

There will be cases in which the evidence is clear, and no further evaluation is necessary to determine that a child's best interests will be served by granting custody to the non-abusive parent. That determination may be driven by a statutory presumption against granting custody or visitation to the abusive parent under such circumstances, or by the court's own judgment after a broader examination of any violence or abusive behavior.

There will be many cases in which a parent who has perpetrated acts of violence or abuse against the child or other parent nonetheless seeks visitation. The potential for harm, and the need for extreme caution in these circumstances, suggests that if the court is inclined to consider such a request, it may be necessary to determine (a) the motivation for the request; (b) the impact ongoing contact will have on the children or on their relationship with the abused parent; and (c) whether visitation should occur and, if so, how it might be structured to assure the safety of the children and abused parent, sometimes limiting access to strictly supervised visitation.

There will be still other cases involving a limited record of domestic violence in which one of the parties will contest the legitimacy of that record or its relevance to custody and visitation determinations. And there will be cases involving allegations, and perhaps counter-allegations, of domestic violence in which there are no public records to serve as substantiation.<sup>24</sup> These cases may benefit from a careful investigation, or evaluation under limited circumstances, conducted within specific parameters established by you. In order to understand fully the impact of a party's assaultive and coercive behavior on the other party or the children, it may be important that an investigation or evaluation carefully examine the existence of such behavior in the allegedly abusive party's prior or current relationships.<sup>25</sup>

### A History of Physical Violence

Concerns are frequently raised that neither the laws governing the issuance of civil restraining/protection orders, nor the laws governing criminal domestic assault cases, sufficiently distinguish between the primary perpetrator of violence in an abusive relationship, and a partner who may be using violence defensively.

In the civil restraining/protection order and criminal contexts, the focus is on specific acts or threats of violence, stalking, or sexual assault. The family court system has both the luxury and the obligation to look more broadly at the dynamics within the family, and to ask whether one partner is abusing the other as a means of coercive control and what the implications of that abuse are for each member of the family. In cases with this profile, a careful examination may reveal that although both parents have a record of violence,

23 For a more complete discussion on risk factors, see Campbell et al., *supra* note 21, and Jacquelyn C. Campbell, *Danger Assessment* (2004) at <http://www.dangerassessment.org> (last visited Dec. 6, 2005).

24 For information on why there may be no documentation of the abuse, see Sarah M. Buel, *Fifty Obstacles to Leaving a.k.a. Why Abuse Victims Stay*, 28 COL. BAR J. 19 (October 1999).

25 However, exploring the context of other relationships may not be possible because of lack of funding, or the evidence derived from such evaluation or investigation may be irrelevant and inadmissible.

only one of the parents poses any ongoing risk to the children or the other parent, or that the parent with a record of violence is actually the victimized partner, not the abuser.

### The Red Flag Cases

Perhaps the most difficult and important case is the “red flag” case (see Card I, Side 2). This is the case in which no record or allegation of domestic violence surfaces when the parties first come to court, and yet the children may have been exposed to domestic violence and/or abused themselves, and may be at risk in the future unless further inquiry is made to inform your best-interests analysis properly.

- Substance abuse, while it does not cause or excuse domestic violence, often co-occurs with it, and can certainly precipitate particular incidents. Substance abuse on the part of an abused partner may or may not be a form of self-medication.
- Mental illness can produce violence, but it can also be the product of exposure to violence or abuse.
- Child abuse, according to current research, may occur in 30 percent to 60 percent of households (depending on the study) in which the mother is also being abused.<sup>26</sup> In cases in which mothers are assaulted by the father, daughters are 6.51 times more at risk of sexual abuse than daughters in homes without domestic violence.<sup>27</sup>
- Post-traumatic stress disorder symptoms (which include those listed on Card I: sleep disturbances, bedwetting, excessive separation anxiety, hyperactivity, withdrawal, aggression or other behavioral problems; depression or anxiety; or regressive behaviors) are important, and it should be determined whether those symptoms result from the abuse of the children or from their exposure to parental violence.
- A lop-sided agreement in an uncontested case, particularly when both parties, or the party who seems to be giving most away, are unrepresented, raises the concern that the “losing” party may not be able to assert his or her own interests and that the agreement may not be in the best interests of the children, perhaps because of patterns of violent or coercive and controlling behavior by the abusive parent.
- Estrangement<sup>28</sup> of children is alleged in many custody disputes; however, when determining the credibility of such allegations, it is important to keep in mind that children who appear estranged from a parent may have legitimate and substantial reasons for being angry, distrustful, or fearful.<sup>29</sup> How to understand issues of estrangement and protection in cases involving domestic violence is treated more fully in the supplementary materials to Card III (p. 24). Perpetrators of domestic violence often accuse their partners of turning the children against them, or may turn the children against their partners, while denying their own behavior—highlighting the importance of determining whether domestic violence is present in cases in which that accusation is made.
- Each parent’s capacity to meet the children’s emotional needs is impacted by the presence of domestic violence. In examining a parent’s capacity to meet the children’s needs, it is important to recognize and understand the impact of an abusive parent’s assaultive and coercive behaviors on the children and the vulnerable parent; as well as

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26 See, e.g., Nat’l Clearinghouse on Child Abuse & Neglect Info., *In Harm’s Way: Domestic Violence and Child Maltreatment 1* (1999). See also JEFFREY L. EDLESON & SUSAN SCHECHTER, NAT’L COUNCIL JUV. & FAM. CT. JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 9 (1999) (citing NAT’L RES. COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT (1993)).

27 Barbara J. Hart, *Children of Domestic Violence: Risks and remedies*, at <http://www.mincava.umn.edu/documents/hart/hart.html> (last visited July 15, 2005) (citing Lee H. Bowker, Michelle Arbitell & J. Richard McFerron, *On the Relationship Between Wife Beating and Child Abuse in FEMINIST PERSPECTIVES ON WIFE ABUSE* (Kersti Yllo and Michele Bograd Eds., 1988)).

28 We refer to cases in which the children may express fear of, be concerned about, have distaste for, or be angry at one of their parents as being estranged from that parent. We do not use the labels of “parental alienation”, “alienation”, or “parental alienation syndrome” to describe this behavior because to do so would give credibility to a “theory” that has been discredited by the scientific community. See AM. PSYCHOL. ASS’N, *supra* note 2, at 40; see also Carol S. Bruch, *Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases*, 14 CHILD & FAM. L. Q. 381 (2002) and Kathleen Coulborn Faller, *The Parental Alienation Syndrome: What Is It and What Data Support It?*, 3 CHILD MALTREATMENT 100 (May 1998). For a more complete discussion on “alienation”, “parental alienation” or “parental alienation syndrome”, see *infra* p. 24-25 (Determine Whether to Admit the Report into Evidence).

29 See Leslie M. Drozd & Nancy W. Olesen, *It is Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1 J. CHILD CUSTODY 65-106 (Nov. 2004).

understand that a vulnerable parent is often able to meet the children's needs more effectively once safe from further violence or abuse.

### **Relocation Cases**

One party may request permission to relocate with the children, and the other may resist that relocation, for a number of reasons, more or less persuasive. In at least some cases, the request to move is motivated by self-protection or a desire to protect the children. If there is a hint that the case may involve domestic violence, or the case is one in which a clear motivation for the relocation appears to be missing, it is essential to explore the possibility that safety concerns may be an underlying reason for the request.<sup>30</sup>

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<sup>30</sup> In the MODEL CODE, *supra* note 17, the NCJFCJ recognized that abused parents may flee or seek to leave their abuser in order to protect themselves and their children when it set forth two provisions addressing relocation: § 402 (2) prohibits a judge from using a parent's absence or relocation based upon an act of domestic or family violence by the other parent as a factor that weighs against the parent in determining custody or visitation, and § 403 creates a rebuttable presumption that it is in the best interest of the child to reside with the non-abusive parent. *See also* Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. KAN. L. REV. 433 (1998) (addressing the question of "why doesn't she just leave" and highlighting how the abusive parent often uses relocation to continue the pattern of coercion and control).

## What Do I Need to Know, from Whom, and How Do I Ask?

If you decide to order a custody evaluation, everyone affected by that order—the parties to the case, their children, the expert who is to conduct the inquiry, and you as the ultimate recipient of the expert’s report—is best served when you articulate clearly what you need to know, when there is a match between the scope of the inquiry and the qualifications of the person assigned to conduct it, and when the process to be followed is well defined and managed by you.

### Frame the Inquiry

#### Investigation, Evaluation, Recommendation

For purposes of this publication, we sweep under the general rubric of “custody evaluation” many different kinds of information gathering. In some cases, you may need only information gathering and a report on what was found. Any of a variety of lay witnesses can perform that function, and we refer to that process in this document as investigation. In other cases, you may need the witness not only to collect and provide information, but also to offer expert opinion testimony about it. We refer to that process as evaluation.

We ask custody evaluators to investigate, process the information they collect, interpret it and draw conclusions from it, which requires that they be qualified as experts if their conclusions and opinions are to be admissible. And we often ask evaluators for recommendations, while appreciating that making custody and visitation determinations is a judicial function, and not one that can be delegated. The guidelines on the cards accompanying these materials offer assistance in negotiating this treacherous terrain.

**All custody evaluators investigate.** The core function of investigators is to gather and interpret information and report their findings to the court. Professionals with varying backgrounds—child protection workers, law enforcement officers, probation officers, domestic violence advocates—may make good investigators. However, different skill sets will be useful in different investigatory contexts. A lawyer’s familiarity with the legal process and with fact-finding may ease his or her access to police, court or child abuse/protection records, and the task of compiling and reporting on the information contained in them. Both lawyers and mental health professionals are likely to be competent in interviewing adults and older children, and synthesizing and reporting what is said. Obtaining information from younger children, and understanding the limits of its reliability, is a task that a mental health clinician with expertise in child development and up-to-date training on appropriate interviewing techniques will be better qualified to perform than someone without that expertise—even though the task is investigatory, it requires specialized skills.

**The line between “investigation” and “evaluation” (in its technical sense) is clearest when the evaluative task requires specific mental health expertise.** Suppose a child, or a parent talking about a child, reports that the child is suffering from nightmares, has had trouble concentrating on school work (reflected in poor grades), complains of frequent stomach pain, and has been in trouble for aggressive behavior on the playground. Any competent investigator could collect and report that information, but only a mental health professional would be qualified to conclude from that information that the child is, or might be, suffering from post-traumatic stress disorder. A *diagnosis* of a party’s or a child’s mental health status, in other words, requires particular expertise.

By the same token, it would be appropriate for either an investigator or an evaluator to report that a party or a child was slumped in the chair, did not make eye contact, jumped

when the door closed, spoke so softly as to be barely audible, or was argumentative during the interview. Those are “lay” opinions within the competence of any responsible professional. It would, however, be inappropriate for someone without mental health expertise to say that a party appeared clinically depressed, or to be suffering from borderline personality disorder. Those opinions are conclusions that must be reserved for experts. What investigative and evaluative reports have in common, however, is that they should both be factually based and should include a showing of sufficient time spent with all parties as well as a thorough research of supplemental information from public and private records or third-party interviews. The facts provide you, as the judge, with a basis for weighing the merit of each parent’s contentions and, in the case of a qualified expert, determining whether that expert’s opinion is sufficiently grounded factually.

Some custody evaluators may use evaluations as a means to facilitate resolution of a case, and may not undertake a thorough fact-finding process. However, as the ultimate fact-finder, you are entitled to and need all relevant information. That information should be unfiltered and straightforward. The evaluator should demonstrate how any violence or other abusive behavior was considered in arriving at conclusions or opinions and in making any proposed recommendations. Minimizing domestic violence undermines the validity of the report.

### **Recommendations to the Court**

Many judges and courts feel that even asking a custody evaluator to offer recommendations at the conclusion of his or her report is an inappropriate delegation of judicial authority. Others fear that it will encourage too heavy a reliance on the evaluator, and will discourage judges from their own careful assessment of the child’s best interests. Some require evaluators to offer recommendations, and feel that a report’s utility is significantly reduced if it does not include them. Given the sharp division of opinion on this issue, we offer suggestions for how a judge can review and work with an evaluator’s recommendations, without inappropriately ceding decision-making authority.<sup>31</sup>

## **Choose the Expert**

Family courts use a variety of mechanisms to identify the pool of experts available for appointment as custody evaluators and to select an evaluator in each case. Your practice will, therefore, be dependent on the mechanisms available to you; you will have more or less flexibility depending on how those mechanisms are structured. Within those constraints, as well as the constraints imposed by limited resources, your goal remains finding a person who has the qualifications best suited to the particular inquiry. In some cases, for example, you might need a specific cultural expertise or expertise in a specialty such as substance abuse. Familiarity with a certain custody evaluator should not substitute for a careful assessment of his or her qualifications to evaluate the present case. Even otherwise good custody evaluators who lack the expertise to recognize domestic violence and appropriately factor it into their evaluations can make serious mistakes in how they report on such cases. It is, therefore, important to choose an evaluator who has training and experience in the issues related to domestic violence, including the dangers associated with separation.<sup>32</sup>

### **First and Foremost, Training and Experience in Domestic Violence**

Domestic violence is its own specialty. Qualification as an expert in the mental health field or as a family law attorney does not necessarily include competence in assessing the presence of domestic violence, its impact on those directly and indirectly affected by it, or its implications for the parenting of each party. And even though some jurisdictions are

31 In a recent issue of *Family Court Review*, mental health professionals, judges, and attorneys discuss the issues related to the efficacy of evaluators who provide courts with custody recommendations. See 43 FAM. CT. REV. 187 (2005), available at <http://www.blackwell-synergy.com/toc/fcre/43/2> (last visited Dec. 6, 2005).

32 See, e.g., Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); and DeKeseredy, Rogness & Schwartz, *supra* note 20.


now requiring custody evaluators to take a minimum amount of training in domestic violence, that “basic training” by itself is unlikely to qualify an evaluator as an expert, or even assure basic competence, in such cases.

Ideally, your jurisdiction will already have a way of designating evaluators who have particular competence in domestic violence. Where that is not the case, you might test the evaluator’s level of experience and expertise, despite the difficulties inherent in any such inquiry, by asking:

- whether the evaluator has been certified as an expert in, or competent in, issues of domestic violence by a professional agency or organization, if such certification is available. If certification is available, the court should inquire into the criteria for “certification”, and determine if it involved a bona fide course of study or practice;
- what courses or training (over what period of time) the evaluator has taken focused on domestic violence;
- the number of cases involving domestic violence that the evaluator has handled in practice or to which he or she has been appointed, remembering, however, that such experience may *simply* reflect the mechanism used by the court in identifying potential evaluators, rather than any relevant expertise; and
- the number of cases in which the evaluator has been qualified as an expert in domestic violence.

## Be Specific about the Information You Need

- **The exposure of children:** As explained in the introductory materials, exposure includes more than directly witnessing violence because children are affected by what they hear as well as by what they see, by the aftermath of violence, and by the atmosphere of fear and threat that characterizes an abusive household.
- **Impact of abusive behaviors on each parent, each child, and each parent/child relationship:** A list of common symptoms of trauma in children is identified in the introduction to these materials. See page 14, The Red Flag Cases. What has not yet been said is that these symptoms can interfere with cognitive and emotional development in children, affect their relationships with adults and peers, impact their school performance, and negatively affect their physical health. The impact of abuse on children’s relationships with both their abusive parent and their non-abusive parent is complex and requires careful exploration. The impact on each child should be evaluated separately. Children are affected differently by the trauma they experience, depending on age, maturity, resiliency, and external supports. While abusive parents frequently allege that their partners have turned the children against them, they often take no responsibility for the fact that their own behaviors have left the children fearful, angry, or distanced, and may have prompted the other parent to try to shield the children from those behaviors. Abusive parents also commonly seek to sabotage the children’s relationship with the other parent, and undermine that parent’s authority, as a means to maintain their own control.<sup>33</sup> These issues are explored further in the supplement to Card III, beginning at page 24, in the discussion of the discredited “parental alienation syndrome.”

 **Short-and long-term safety concerns for children and/or a parent:** The evaluator can glean this information from what has happened in the past, and by talking with the parties and, as appropriate, the children about explicit threats that have been made and threatening behaviors. It is also important to know what the parties and children fear, both because they may be in the best position to predict what will happen, and because even if their fears may appear to be exaggerated or minimized under the circumstances, those fears and the actions taken to address them are relevant to the inquiry into short- and long-term safety concerns for the children and/or a parent.



The most crucial point here is that reports based solely on interviewing and/or observing the parties and their children will rarely, if ever, produce an adequate evaluation in a case known or suspected to involve domestic violence.

## Articulate Expected Sources of Information

Since abusive partners may deny and minimize their use of violence and other controlling behaviors, even to themselves, they may present as sincere and caring partners and parents.<sup>34</sup> Their expressed concerns about the parenting capacity of their abused partners may be consistent with a longstanding habit of relentless criticism.<sup>35</sup> Alternatively, the abused partner may indeed present as a less than competent parent; but his or her deficiencies may result from the emotional and physical toll the abuse has taken, and may to that extent be temporary in nature.<sup>36</sup> Children may, in self-protection, have identified with their abusive parent rather than the parent who appears unable to offer protection, and may, in the form of rejection or blame of the victim, express their anger at being unprotected.<sup>37</sup>

In this complex and confusing environment, an evaluation that reaches conclusions based on the “he said/she said” of conflicting accounts without recourse to other corroborating sources may be inherently unreliable.

### Helpful collateral sources may include:

- other family members, friends, neighbors, co-workers (especially of the abused parent), community members, or former partners who have had regular interactions with the family or been involved in particular incidents relevant to the inquiry. Care must be taken in these instances to guard the flow of information so that neither an adult party nor a child is put at increased risk, keeping in mind that the abuse may not have been disclosed to others yet;
- professionals with whom the family has had ongoing associations, such as doctors, teachers, clergy, or counselors;
- professionals (including shelter advocates, child welfare workers, or attorneys) who have become involved with the family because of reported incidents of, or concerns about, domestic violence or the safety or well-being of the children involved.

### Pertinent records may include:

- police reports;
- child abuse/child protection reports;
- court files in the present case and any relevant prior civil or criminal cases involving either party;
- medical, mental health, and dental records; and
- school records.

### In all cases, the relevant questions are:

- Have there been incidents of physical violence or other forms of abuse perpetrated by one parent against the other?
- What impact has the violence or abuse had on the parties and their parenting?
- What impact has the violence or abuse had on each of the children?
- What does the abusive parent’s past behavior indicate about this or her future propensity to undermine the other parent’s authority or damage that parent’s relationship with the children?

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34 The custody evaluator who is unaware of the frequency with which abusers seek custody as a means to continue their control over the abused parent may inappropriately assume that an abusive parent is instead seeking custody because he or she is caring and concerned. See JAFFE, LEMON, & POISSON, *supra* note 15, at 32 (discussing how the family court can be exploited by the perpetrator of domestic violence as a means of continuing their abusive behavior).

35 See BANCROFT & SILVERMAN, *supra* note 16.

36 See e.g., Cris M. Sullivan et al., *Beyond Searching for Deficits: Evidence that Physically and Emotionally Abused Women Are Nurturing Parents*, 2 J. EMOTIONAL ABUSE 51-71 (2000) (finding that assailants’ abuse of mothers had more of a direct impact on children’s behavioral adjustment, highlighting the need to focus on mothers’ strengths and assets).

37 Clare Dalton, Judge Susan Carbon & Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11, 20 (2003).

- What risks will continued exposure to the abusive parent pose to the children or abused parent?

The important questions raised by requests for parties to provide the evaluator access to privileged information are dealt with *infra*, in the context of the obligations of the parties. We also discuss the value of and risks associated with psychological testing for custody and visitation determinations.

### **The Role of Psychological Testing**

In the rare case in which it is a relevant and necessary aspect of an evaluation, you may decide, or the expert may determine, that psychological testing would provide a helpful supplement to the information obtained through interviews and examination of the written record. This is an area to approach with caution.<sup>38</sup> If psychological tests are used, the test(s) should be administered and interpreted by a psychologist who has expertise in the use of psychological testing in the context of contested child custody cases with allegations or evidence of domestic violence. Generally, however, psychological testing is not appropriate in domestic violence situations. Such testing may misdiagnose the non-abusive parent's normal response to the abuse or violence as demonstrating mental illness,<sup>39</sup> effectively shifting the focus away from the assaultive and coercive behaviors of the abusive parent.

#### **The relevant questions to ask are the following:**

- What is the test being used to measure?
- How is the test relevant to issues of custody and visitation?<sup>40</sup>
- Is the test valid for the purposes for which it is being used, and is the expense justifiable given the test's limitations?
- Is the test recognized and accepted by experts in the field?
- What are the qualifications necessary to use the instrument?
- Does the expert have those qualifications?

#### **In determining the relevance and reliability of psychological testing, consider the following:**

- Research literature indicates that "there are no psychological tests that have been validated to assess parenting directly."<sup>41</sup>
- No psychological test can determine whether or not a person has been an abuser or abused.<sup>42</sup> There is no single profile of a victim or a perpetrator of abuse.
- The more tailored tests, developed in the past decade to address the questions most relevant in the custody context, such as the Bricklin Perceptual Scales (BPS), Perception of Relationships Test (PORT), Ackerman-Schoendorf Scales for Parent Evaluation of Custody Test (ASPECT) and Parent Awareness Skills Survey (PASS) tests, have not been

38 See Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgement*, 36 FAM. L.Q. 135 (2002) (stating that "[a]s a matter of law and as a matter of science, a test should be both relevant and reliable before its use is sanctioned in a particular setting").

39 See Nancy S. Erickson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?*, 39 FAM. L.Q. 87 (Spring 2005). The author emphasizes the need for child custody evaluators who use the MMPI-2 psychological test to consider the context of the individual's history and current situation in their clinical interpretations. Such context includes a person's age, intelligence, social or ethnic class, educational level, health status, medication influences, prior life traumas, and current situational difficulties (p. 94, citing ALAN F. FRIEDMAN ET AL., *PSYCHOLOGICAL ASSESSMENT WITH THE MMPI-2* (2001)). If taken out of context, the MMPI scores of battered women could lead mental health evaluators to misdiagnose them as severely mentally ill, even though they may actually be suffering from the trauma of the violence (p.102).

40 See, Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Child Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 204 (2005) (stating that "there is no evidence in the empirical literature that current interview protocols, traditional psychological tests, or custody-specific tests are in any way able to reliably predict child adjustment to different access plans...").

41 Shuman, *supra* note 38, at 144 (citing Vivienne Roseby, *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29, FAM. L.Q. 97, 105 (1995)).

42 See e.g., Aldarondo & Mederos, *supra* note 12, at 2-11 (stating that it is impossible to diagnose battering in the same manner that one diagnoses medical conditions such as cancer and anxiety disorders; expounding further that a determination as to whether someone is a batterer is not a clinical decision, but rather "a determination based on reviewing information provided by collateral sources, the alleged abuser, and victims"). Because psychological testing cannot identify an abusive parent, such testing may instead allow an abusive parent to use the absence of domestic violence findings in the test results to argue that the test proved that the abuse did not take place.

evaluated with enough rigor to establish their validity or reliability. These tests do not provide answers. At best, they raise hypotheses in the mind of the evaluator to be validated or invalidated in subsequent explorations.<sup>43</sup>

- The standard psychological tests measuring personality, psychopathology, intelligence or achievement, including the Minnesota Multiphasic Personality Inventory (MMPI-2), Million Clinical Multi-axial Inventory (MCMI-III), Personality Assessment Inventory (PAI), Rorschach Inkblot Test, Children's Apperception Test (CAT), Thematic Apperception Test (TAT), Wechsler Adult Intelligence Scale (WAIS-III), and Wide Range Achievement Test (WRAT-3), do not directly address the psycho-legal issues relevant to most children, or parents' child-rearing attitudes and capacities.<sup>44</sup> In a particular case, a standard test may offer information that is related to parent-child interactions, parent functioning or child functioning; but that information should be included in the evaluation *only if* the examiner makes clear the connection between the test results and the issue that is legally relevant in the custody context, and *only if* the test results are empirically supported and integrated with other data about real-life behavior.<sup>45</sup>
- Some of these standard tests may also measure and confuse psychological distress or dysfunction induced by exposure to domestic violence with personality disorder or psychopathology. While there may be cases in which trauma induced by abuse has a negative impact on parenting in the short term, it is critically important not to attach a damaging label prematurely to a parent whose functioning may improve dramatically once she or he is safe, the acute stress has been alleviated, and the trauma treated.<sup>46</sup>
- Specific tests to assess for trauma (Trauma Symptom Inventory (TSI), Draw-a-Person Test (DAP) and others) may be helpful in determining treatment goals and facilitating the healing process of the victim parent and children, but they are not appropriate to determine whether traumatic incident(s) occurred.

## Communicate Expectations about Information-Gathering Procedures and Safe Practices

In cases of known or suspected domestic violence, the information-gathering procedures identified on Card IIA, Side 1, can protect the abused parent and children from additional harm and increase the integrity of the information obtained. Adults or children who have experienced or been exposed to violence are unlikely to talk openly about it if they are fearful that the perpetrator will have opportunities for retaliation,<sup>47</sup> or if they are too ashamed to disclose the violence or abuse.

With care, the evaluator will be able to shield the parties from any contact or unsafe communication with one another during the evaluation process. In many cases, the evaluator will also be able to seek corroboration of negative information disclosed by one party about the other without disclosing the source of that information. It is important, however, to ensure that the parties understand the lack of confidentiality in the evaluation process.

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43 Shuman, *supra* note 36, at 144 - 154.

44 See Jonathan W. Gould & Hon. Lisa C. Bell, *Forensic Methods and Procedures Applied to Child Custody Evaluations: What Judges Need to Know in Determining a Competent Forensic Work Product*, 51 JUV. & FAM. CT. J. 21, 24 (2000) (stating that no personality test directly measures parenting or parenting competencies. The authors also recommend the use of traditional psychological tests only when specific problems or issues that these tests are designed to measure are relevant to the cases, citing GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (2d ed. 1997)).

45 See Gould & Bell, *id.* See also Jonathan W. Gould & David A. Martindale, *A Second Call for Clinical Humility and Judicial Vigilance: Comments on Tippins and Wittmann*, 43 FAM. CT. REV. 253 (2005) (stating that psychological assessment tools are often not valid for custody evaluation, are often not empirically derived, and are "often more educated guesses than truth"—cautioning that mental health professionals need to be careful in presenting their data and opinions so as not to mislead the court).

46 See AM. PSYCHOL. ASS'N, *supra* note 2, at 100 (1994) (cautioning that psychological evaluators who are not trained in domestic violence may ignore or minimize the violence and attach inappropriate pathological labels to women's responses to chronic victimization); see also Erickson, *supra* note 39.

47 See Logan, *supra* note 4, at 734-735 (citing a study, which found that abused women were more likely than non-abused women to report that the abuser may impact their ability to communicate openly during the court process because of possible future harm).

## Alternative available corroboration strategies for information gathering include:

- seeking corroboration from third-party sources, where available; and
- inviting the other party to give an open-ended account of a particular incident and asking follow-up questions, without revealing details shared by the first party.



If it becomes clear that information must be disclosed that may put one of the parties at risk, the evaluator should alert that party to the disclosure in advance, so that he or she may take whatever safety precautions are warranted and available. Evaluators may need to provide the abused party with information on safety planning, or assist in developing a safety plan—which may include referring the abused party to a domestic violence program or shelter.<sup>48</sup>

Special considerations apply to interviews of children and the use of information obtained from them. First, interview strategies should be non-suggestive and appropriate to the age and developmental stage of the child. Second, the evaluator must build into his or her report the understanding that, while children may provide accurate information, their answers may also involve misinterpretations (or developmentally appropriate but immature interpretations) of events, statements or dynamics, or be influenced by input from one or both parents. From a safety perspective, it is also critical that the evaluator not attribute direct quotes to children, in order to reduce the risk that a parent will use the children's words against them or against the other parent.

An evaluator who does not respect the safety-driven procedures listed on the cards accompanying these materials is not qualified to conduct an evaluation in a domestic violence case. An evaluation that has been conducted without following those procedures will not yield reliable information or opinions and may be dangerous.

## Define the Obligations of the Participants

### The Obligations of the Parties

By stressing the need for the parties to assist the evaluator in accessing relevant information, we do not mean to discount the sensitivity of the decision whether or not to waive a privilege attaching to information that might be obtained from a collateral source, or might be gleaned from a written record. It is the responsibility of the parties' attorneys, if they are represented, and of the evaluator, particularly if they are not represented, to ensure that the parties fully understand the implications of both choosing and declining to waive a privilege, and are able to make an informed decision. It may also be important to determine whether a parent can waive the privilege attaching to a child's relationship with a therapist; in some jurisdictions, only the child's own representative or the therapist can take that step.<sup>49</sup> Verbal or written information given to the parties should be in their language, or the parties' attorneys or the evaluator should ensure the availability of a translator or a determination of literacy.<sup>50</sup>



Any party who fears that disclosure of information will place him or her at risk of retaliation or who believes that vital privacy interests may be compromised by the investigation should be able to inform the court of his or her concerns *before* communicating the information.

48 For more information on safety plans, see National Coalition Against Domestic Violence, *Protect Yourself*, at [http://www.ncadv.org/protectyourself/SafetyPlan\\_130.html](http://www.ncadv.org/protectyourself/SafetyPlan_130.html) (last visited Dec. 6, 2005). See also Barbara J. Hart, *Personalized Safety Plan* (1992), at <http://www.mincava.umn.edu/documents/hart/hart.html#id2305464> (last visited Dec. 6, 2005).

49 See e.g., *Hughes v. Schatzberg*, 872 So.2d 996 (Fla. App. 4 Dist., 2004) (holding that mother did not have standing to assert the patient-psychotherapist privilege on behalf of the child where she is involved in litigation over the child's welfare); *McCormack v. Board of Education*, 158 Md.App. 292, 857 A.2d 159 (2004) (holding that the trial court should have determined whether there was a conflict of interest between parents and child before ruling that parents could neither assert nor waive child's psychotherapist-patient privilege in an appeal of a final judgment modifying custody decree).

50 See Deena Jang, *Linguistic Accessibility and Cultural Competency Issues Affecting Battered Women of Color in Family Court*, SYNERGY (NCJFJC, Reno, NV), Summer 1999, at 4 (stating that "[t]he experiences, frustrations, and concerns of battered women of color cannot be discounted or trivialized by assuming the justice system addresses their needs without further consideration of their linguistic or cultural characteristics").

## **The Obligations of the Evaluator**

In regard to the obligations identified on Card IIA, side 2 (fourth bullet), the question of when, if ever, it would be appropriate for a mental health professional to enter a therapeutic, counseling, or other professional relationship with a party or a child, subsequent to providing a custody evaluation in a case involving those individuals, is a vexed one. Because no custody case is truly “closed,” at least until the children reach the age of majority, and because the evaluator may be asked to return to court to assist in subsequent proceedings, the safest course of action is for the evaluator to avoid any subsequent professional contact, along with the conflict of interest it inevitably creates. If, in a small community, that guideline is too restrictive, then it may be appropriate to adopt a less restrictive but clear “waiting period” to discourage the creation of conflict at least during the period when re-litigation is most likely.

## **Court Initiative**

We also recommend that, at the time of appointment of the evaluator, the court take the initiative when possible in ordering any records available to the court, such as criminal records, court activity records and child abuse/child protection reports. All these steps will facilitate the evaluation process and prevent the delays that follow when the evaluator and/or the parties are forced to return to court to clarify the terms of the appointment.



## Reading the Report

### Safety First

Consistent with the emphasis on safety throughout these materials, we suggest that the judge, once the evaluator's report is admitted into evidence, make an immediate determination whether the report identifies risks that should be promptly addressed, or whether disclosure of the report to the parties may create risks that should be promptly guarded against. The responses suggested on Card III are meant to be illustrative only; there may be additional steps available to you depending on the rules governing your court.

### Determine Whether to Admit the Report into Evidence

Unless admissibility is stipulated by counsel for each party, the Court must subject both the evaluation report and the expert testimony derived from the evaluation to critical scrutiny, assessing carefully the validity and reliability of each before determining whether they are admissible as evidence.<sup>51</sup>

#### Parental Alienation and the *Daubert* Standard: on Syndromes and Behaviors

In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from "parental alienation syndrome" or "PAS".<sup>52</sup> Under relevant evidentiary standards, the court should not accept this testimony.

The theory positing the existence of "PAS" has been discredited by the scientific community.<sup>53</sup> In *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court ruled that even expert testimony based in the "soft sciences" must meet the standard set in the *Daubert*<sup>54</sup> case. *Daubert*, in which the Court re-examined the standard it had earlier articulated in the *Frye*<sup>55</sup> case, requires application of a multi-factor test, including peer review, publication, testability, rate of error, and general acceptance. "Parental Alienation Syndrome" does not pass this test. Any testimony that a party to a custody case suffers from the syndrome or "parental alienation" should therefore be ruled inadmissible and/or stricken from the evaluation report under both the standard established in *Daubert* and the earlier *Frye* standard.<sup>56</sup>

The discredited "diagnosis" of "PAS" (or allegation of "parental alienation"), quite apart from its scientific invalidity, inappropriately asks the court to assume that the children's behaviors and attitudes toward the parent who claims to be "alienated" have no grounding in reality. It also diverts attention away from the behaviors of the abusive parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways toward the children themselves, or the children's other parent. The task for the court is to distinguish between situations in which children are critical of one parent because they have been inappropriately manipulated by the other (taking care not to rely solely on subtle indications), and situations in which children have their own legitimate grounds for criticism or fear of a parent, which will likely be the case when that parent has perpetrated domestic violence. Those grounds do not

51 See e.g., Shuman, *supra* note 38, at 150, 160 (asking "How can the law be a critical consumer of mental health practitioner expertise if it ignores the scientific community's critiques of proffered expert testimony and fails to apply discriminating threshold standards of admissibility of expert evidence derived from these tests?"; further arguing that qualifications alone do not provide any guarantees that expert opinions are based on reliable methods and procedures).

52 "Parental alienation syndrome" was introduced by Richard Gardner and was primarily associated with child sexual abuse allegations in the context of contested child custody cases. For more information, see Bruch, *supra* note 28.

53 According to the American Psychological Association, "... there are no data to support the phenomenon called parental alienation syndrome ..." AM. PSYCHOL. ASS'N., *supra* note 2, at 40.

54 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

55 *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

56 These are federal standards, but many states adhere to them at least generally and should still exclude any proffered evidence of "PAS".

become less legitimate because the abused parent shares them, and seeks to advocate for the children by voicing their concerns.

### **Cases known or suspected to involve domestic violence pose particular challenges because:**

- It is appropriate for parents to try to protect themselves or their children from exposure to violence, even when it means limiting the other parent's contact with the children;<sup>57</sup>
- Abusive partners commonly sabotage their respective partner's parental authority over, and relationship with, the children;<sup>58</sup>
- Abusive parents rarely take responsibility for the consequences of their behaviors, but instead blame their partners for turning the children against them;<sup>59</sup> and
- Children in abusive households may feel safer identifying with the abusive and more powerful parent.<sup>60</sup>

If the history of violence is ignored as the context for the abused parent's behavior in a custody evaluation, she or he may appear antagonistic, unhelpful, or mentally unstable.<sup>61</sup> Evaluators may then wrongly determine that the parent is not fostering a positive relationship with the abusive parent and inappropriately suggest giving the abusive parent custody or unsupervised visitation in spite of the history of violence; this is especially true if the evaluator minimizes the impact on children of violence against a parent or pathologizes the abused parent's responses to the violence.<sup>62</sup>

Custody evaluators, therefore, should be advised to listen carefully to children's concerns about each of their parents, and follow up with a careful investigation as to whether those concerns are grounded in fact, what role each parent has played in shaping the children's perceptions of the other parent, and each parent's apparent motivation. This careful fact-based inquiry, unlike applying the "PAS" label, is likely to yield testimony that is more accurate and relevant.

## **Read the Report Critically**

The checklist provided on Card III offers a recap of much of the material included on Cards I and II, offering you a final opportunity to assess how well the evaluation has been performed, and the extent to which you can feel comfortable relying on its conclusions.<sup>63</sup>

**One common flaw in reports** prepared by custody evaluators that deserves special mention is "**confirmatory bias.**" It appears when the evaluator develops a hypothesis—forms an opinion about some issue in the case—early in his or her process, finds data to support it, confirms the hypothesis, and then stops testing it against new or different data that might undermine the hypothesis or effect a change of mind.

### **As the judge, you can test for the presence of this "confirmatory bias" by:**

- looking at the extent to which the evaluator has made use of collateral sources and available documentation to corroborate important findings of fact on which his or her conclusions and recommendations are based;
- looking at whether the evaluator has made available to you all the relevant data gleaned in the course of the inquiry: both the data that support the evaluator's conclusions and recommendations, *and* the data that might have led to competing conclusions or recommendations. If the report seems suspiciously one-sided, you might conclude that

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57 See Drozd & Olesen, *supra* note 29.

58 See BANCROFT & SILVERMAN, *supra* note 16, at 57-64.

59 See *id.* at 29-53.

60 See Dalton, Carbon & Olesen, *supra* note 37.

61 Am. Psychol. Ass'n, *Issues and Dilemmas in Family Violence: Issue 5*, at <http://www.apa.org/pi/pii/issues/issue5.html> (last visited Dec. 6, 2005).

62 *Id.*


63 See Shuman, *supra* note 38, at 19 ("relying on experts without testing the reliability of their methods and procedures cloaks experts' value judgments under the veil of science and risks that their personal and professional characteristics bias the evaluation and the importance of information learned", citing Robert Henley Woody, *Behavioral Science Criteria in Child Custody Determinations*, 3 J. FAM. & MARRIAGE COUNS. 11 (1977)).

the evaluator has left out data that did not support his or her conclusions and recommendations;

- looking at whether the evaluator has identified areas where he or she has been unable to obtain information or to reconcile or choose between competing accounts; and
- looking at whether the evaluator appears to use myths or stereotypes regarding domestic violence, such as assuming that an angry mistrustful parent is most likely making a false allegation to gain leverage in the custody case or assuming that a child would not be happy to see the abusive parent at a supervised or unsupervised visitation.

## Assess the Recommendations

A final test of the evaluator's expertise is whether his or her recommendations take into account the need to protect the physical and emotional safety of the abused parent and children involved in the case, and whether the recommendations offered make full use of the range of alternatives available in the case, such as:

- granting sole physical and legal custody to the abused parent;
-  postponing visitation until the abused parent and the children have had an opportunity to establish their safety and heal from any trauma associated with violence or abuse;<sup>64</sup>
- postponing visitation until the violent or abusive parent has successfully completed appropriate treatment, including a batterers intervention program. If your jurisdiction provides guidelines and certification for programs, use only sanctioned programs. Anger management, pastoral counseling, couples counseling,<sup>65</sup> and parenting programs are not appropriate forms of intervention in cases with domestic violence and can heighten danger for the abused parent and/or children. It is also important to understand that completing a batterers intervention program does not guarantee that the abusive parent will change his or her behavior;<sup>66</sup>
- allowing relocation to a confidential address (or, if that has already occurred, making sure that the address is kept confidential from the violent or abusive parent);
- restraining the violent or abusive parent's communication with or proximity to the other parent;
- restraining the violent or abusive parent's communication with or proximity to the children, except in the context of authorized visitation;
- structuring visitation with specific levels of restriction as seems appropriate:
  - ◆ visits in a formally structured supervised setting;
  - ◆ visits informally supervised by appropriate family members—provided the court establishes clear guidelines to be followed during visitation related to the supervisor's responsibilities and his or her authority during supervision, and provided both parents have consented to the choice of supervisor;
  - ◆ denial of overnight visits;
  - ◆ visits limited as to duration (with gradual increases in time allotted if safe to do so) and limited to a specific location or locations;
  - ◆ restrictions on the presence of specific persons other than the parent while the parent is with the children;
  - ◆ prohibition of the violent or abusive parent's use of alcohol or drugs during or within a specified time period prior to visits;
  - ◆ any other conditions that are deemed necessary to provide for the safety of the child, the abused parent, or other family or household members;

<sup>64</sup> Jaffe, Crooks & Poisson, *supra* note 2, at 61 (finding in their study that time appeared to be a healing factor for children when it was associated with an end to the violence; stating that "the longer the children had gone without seeing their father, the greater the improvement in their overall adjustment").

<sup>65</sup> See Aldarondo & Mederos, *supra* note 12, at 2-13 (stating that traditional couples counseling does not address well the issues of oppression, coercion, and violence in intimate relationships; and that there are no studies that have explored the safety of women when couples counseling is used in domestic violence cases).

<sup>66</sup> See "easing visitation restrictions" in this list, *infra*. Also, for more information about program effectiveness, see Etiony Aldarondo, *Evaluating the Efficacy of Interventions with Men Who Batter*, in PROGRAMS FOR MEN WHO BATTER (Etiony Aldarondo & Fernando Mederos eds., 2002), *supra* note 12, at 3-1; and see EDWARD GONDOLF, BATTERER INTERVENTION SYSTEMS: ISSUES, OUTCOMES, AND RECOMMENDATIONS (2002).



- easing visitation restrictions over time if the violent or abusive parent has remained in strict compliance with the court orders and/or treatment plans, provided that parent has shown observable and measurable improvements regarding domestic violence and parenting, and provided that safety concerns for both the children and the abused parent have realistically decreased;<sup>67</sup>
- exchanging children through an intermediary, or in a protected setting; and/or
- securing each child's passport and requiring a violent or abusive parent to post a bond to secure the return of children after a visit, or to secure any other performance on which visitation is conditioned.<sup>68</sup>

**Finally, there will be occasional cases where the only way to serve the children's best interests will be to deny the violent or abusive parent any future contact with the children because it seems that less restrictive alternatives will not secure their safety or that of the other parent.**

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<sup>67</sup> See Peter Jaffe, Claire Crooks & Hon. Frances Wong, *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interests*, 6 J. CTR. FOR FAM., CHILD. & CT. 95 (2005) (addressing the role of the family court and its court-related services in determining parental contact following allegations of domestic violence).

<sup>68</sup> This list draws heavily on the list of "appropriate measures" contained in § 2.11(2) in AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTIONS: ANALYSIS AND RECOMMENDATIONS (2002) and § 405 in MODEL CODE, *supra* note 18. See also, AM. PSYCHOL. ASS'N, *supra* note 2, at 99 ("In a matter of custody, preference should be given to the nonviolent parent whenever possible, and unsupervised visitation should not be granted to the perpetrator until an offender-specific treatment program is successfully completed, or the offender proves that he is no longer a threat to the physical and emotional safety of the child and the other parent. Visitation should be supervised by an appropriate neutral party who will advocate for the child.").



# Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

## Additional Resources

### Reading Material

#### Books

AM. PSYCHOL. ASSOC'N (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001). *DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY*. Washington, DC: Am. Psychol. Assoc'n.

MARY M. LOVIK (3rd ed. 2004). *DOMESTIC VIOLENCE BENCHBOOK: A GUIDE TO CIVIL AND CRIMINAL PROCEEDINGS*. Lansing, MI: Mich. Jud. Inst.

JAMES PTACEK (1999). *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES*. Boston: Northeastern U. Press.

MARIA D. RAMOS & MICHAEL W. RUNNER (1999). *CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDGES BENCH BOOK*. San Francisco: Fam. Violence Prevention Fund.

MICHAEL RUNNER & SUJATA WARRIOR (2001). *CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDICIAL EDUCATION CURRICULUM*. San Francisco: Fam. Violence Prevention Fund.

NEIL WEBSDALE (1999). *UNDERSTANDING DOMESTIC HOMICIDE*. Boston: Northeastern U. Press.

#### Articles

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Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with "Outside Neutrals"*, 42 JUDGES' J. 10 (Winter 2003).

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## **Links to Organizations**

### **American Bar Association (ABA),**

<http://www.abanet.org>, seeks to provide attorneys and judges with the knowledge and tools needed to assist them in their legal profession. The ABA has several programs targeted to specialized areas of interest, which are highlighted below.

### **Center on Children and the Law,**

<http://www.abanet.org/child/home2.html>, provides technical assistance, training, and research that "[address] a broad spectrum of law and court-related topics affecting children. These topics include child abuse and neglect, custody and support, guardianship, and children's exposure to domestic violence."

### **Child Custody Pro Bono Project,**

<http://www.abanet.org/legalservices/probono/childcustody.html>, is a joint project of the ABA Standing Committee on Pro Bono and Public Service and Family Law Section and seeks to "enhance[] and expand[] the delivery of legal services to poor and low income children involved in divorce, adoption, guardianship, unmarried parent, and protective order matters." The Child Custody Pro Bono Project identifies and develops "best practices", training, and technical assistance for courts and pro bono programs, and is a national resource in the area of child custody.



**Commission on Domestic Violence,**

<http://www.abanet.org/domviol/home.html>, works “to mobilize the legal profession to provide access to justice and safety for victims of domestic violence.” The Commission produces publications that assist professionals in the field, including the newest edition of *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK*, 2ND ED. (2004).

**Family Law Section,**

<http://www.abanet.org/family/home.html>, has a mission “to [s]erve as the National Leader in the Field of Marital and Family Law.” Among its stated goals is to improve the public and professional understanding about marital and family law issues and practitioners.

**American Judges Association (AJA),**

<http://aja.ncsc.dni.us/domviol/page1.html>, seeks to improve “the effective and impartial administration of justice, to enhance the independence and status of the judiciary, to provide for continuing education of its members, and to promote the interchange of ideas of a judicial nature among judges, court organizations and the public.” The AJA offers publications to address domestic violence issues, including a *Special Issue on Domestic Violence*, 39 CT. REV. 4-51 (Fall 2002) and *Domestic Violence & The Courtroom: Understanding The Problem—Knowing The Victim*, both of which can be downloaded from its website.

**Association of Family and Conciliation Courts (AFCC),**

<http://www.afccnet.org>, is “an international and interdisciplinary association of family, court, and community professionals dedicated to constructive resolution of family disputes.” Among its stated purposes, the AFCC seeks to provide an interdisciplinary forum for the exchange of ideas and the development of procedures to assist families in conflict and to develop and improve parent education, mediation, custody evaluation, and other processes to aid families in resolving their disputes.

**Battered Women’s Justice Project (BWJP),**

<http://bwjp.org>, is a collaborative effort of three organizations whose mission is “to promote systemic change within community organizations and governmental agencies engaged in the civil and criminal justice response to domestic violence that creates true institutional accountability to the goal of ensuring safety for battered women and their families. To this end, BWJP undertakes projects on the local, state, national, and international levels.” BWJP, Civil Office, works with professionals on issues such as divorce and support, child custody, separation violence, mediation, and protection orders.

**Center for Families, Children & the Courts (CFCC), Family Violence Project,**

<http://www.courtinfo.ca.gov/programs/cfcc/programs/description/famviol.htm>, is a project of the Judicial Council of California, Administrative Office of the Courts, that focuses on how the courts and court-related professionals address issues of family violence and offers training for child custody evaluators on domestic violence in accordance with the California Rules of Court.

**Family Violence Prevention Fund (FVPPF),**

<http://www.endabuse.org>, “works to prevent violence within the home, and in the community, to help those whose lives are devastated by violence because everyone has the right to live free of violence.” FVPPF’s Judicial Education Project, in partnership with the National Council of Juvenile and Family Court Judges, conducts education seminars for judges across the country in order to enhance their skills in handling criminal and civil domestic violence cases.



**Legal Resource Center on Violence Against Women (LRC),**

<http://www.lrcvaw.org>, seeks “to obtain legal representation for domestic violence survivors in interstate custody cases and to provide technical assistance to domestic violence victim advocates and attorneys in such cases.” The website provides helpful information and links for survivors, advocates, and attorneys.

**Minnesota Center Against Violence and Abuse (MINCAVA),**

<http://www.mincava.umn.edu>, operates an electronic clearinghouse that provides research, education, and access to more than 3,000 violence-related resources on such issues as child abuse, domestic violence, dating violence, stalking, sexual violence, and elder abuse.

**National American Indian Court Judges Association (NAICJ),**

<http://www.naicja.org>, is “a national voluntary association of tribal court judges. Its membership is primarily judges, justices and peacemakers serving in tribal justice systems. NAICJA is a non-profit corporation established in 1969. The Association is primarily devoted to the support of American Indian and Alaska Native justice systems through education, information sharing and advocacy. The mission of the Association, as a national representative membership organization, is to strengthen and enhance tribal justice systems.”

**National Association of Counsel for Children (NACC),**

<http://naccchildlaw.org>, mission is “to improve the lives of children and families through legal advocacy. The NACC provides training and technical assistance to attorneys and other professionals, serves as a public information and professional referral center, and engages in public policy and legislative advocacy.”

**National Association of Women Judges (NAWJ),**

<http://www.nawj.org>, is dedicated “to ensuring equal justice and access to the courts for all including women, youth, the elderly, minorities, the underprivileged, and people with disabilities; providing judicial education on cutting-edge issues of importance; developing judicial leaders; increasing the number of women on the bench in order for the judiciary to more accurately reflect the role of women in a democratic society; and improving the administration of justice to provide gender-fair decisions for both male and female litigants.”

**National Center for State Courts (NCSC),**

<http://www.ncsconline.org>, provides “up-to-date information and hands-on assistance that helps [court leaders] better serve the public. NCSC offers solutions that enhance court operations with the latest technology; collects and interprets the latest data on court operations nationwide; and provides information on proven ‘best practices’ for improving court operations in many areas, such as civil case management.”

**National Council of Juvenile and Family Court Judges (NCJFCJ),**

<http://www.ncjfcj.org>, is “dedicated to serving the nation’s children and families by improving the courts of juvenile and family jurisdictions.” NCJFCJ has dedicated programs addressing family violence, child abuse and neglect, victims of juvenile offenders, alcohol and drug abuse, termination of parental rights, child support enforcement, adoption and foster care, and juvenile delinquency.

**Office on Violence Against Women (OVW), U.S. Department of Justice,**

<http://www.ojp.usdoj.gov/vawo>, provides on-line resources with “up-to-date information on interventions to stop violence against women for criminal justice practitioners, advocates, and social service professionals with the latest in research and domestic violence, stalking, batterer intervention programs, child custody [and] protection, sexual assault, and welfare reform.”



## Ordering an Evaluation: When Is Domestic Violence Expertise Necessary?

**REMEMBER:** Not every case will require or need an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented litigants with a checklist of needed information, and assessing your own ability to make safe and responsible decisions in light of both the information you have and the information you do not.

### The Fundamental Question:

### What If There Are No Resources for an Evaluation?

### Is There a Need for an Emergency/Interim Assessment?

#### Is this a case where I need assistance in determining:

- the presence and extent of physical or sexual violence or other assaultive or coercive behaviors used by one parent against the other;
- the impact of domestic violence on the children;
- the effect of domestic violence on the parenting of each party; and
- the impact of domestic violence on decisions about how to structure custody and visitation?

**(See also supplemental material, INTRODUCTION, p. 7-11.)**

Many litigants are unable to afford evaluations, and many courts have limited evaluation resources. If resource constraints, or the lack of a qualified evaluator, preclude an evaluation in a particular case, this tool may still assist you:

- to identify categories of evidence that the parties' attorneys should produce;
- to outline information that unrepresented litigants need to provide to assist your decision making;
- to allocate limited evaluation resources to maximum effect; \* and
- to make safe and responsible decisions even in situations where you lack complete information—there is value in knowing what you do not know.

**NO**, if a restraining/protection order is in place and provides needed relief, the party against whom it was issued is in compliance, and the situation is stable.

**YES**, if an existing restraining/protection order has been violated or is not adequate (e.g. fails to provide needed relief), or if there is no restraining/protection order in place, and you have reason to be concerned about the safety of one or both of the parties and/or their children. You may want an interim safety assessment performed by a qualified expert before issuing temporary orders to stabilize the situation pending a final resolution of the contested issues. \*

#### **FACTORS that might prompt an emergency/interim safety assessment include:**

- credible allegations of child abuse, which often co-occurs with domestic violence;
- one or more convictions of domestic violence-related or other violent offenses;
- a record of one or more 911 calls;
- possession of, access to, or threats to use firearms in conjunction with evidence of assaultive or coercive behavior perpetrated by one parent against the other;
- evidence of stalking;
- evidence of harm or threats of harm to partner or children, or threats of harm to pets or property;
- evidence of suicide threats or threats of self-harm;
- evidence of threats of abduction of children;
- a history of drug or alcohol abuse;
- a prior record of restraining/protection orders involving this partner or a former partner (see also supplemental material, History of Physical Violence, p. 13, examining cases in which there may be a record against both parents);
- evidence of assaultive and coercive behaviors, even if there is no history of physical or sexual violence; and/or
- evidence of violations of prior or existing restraining/protection orders.

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

# Is There a Need for an Emergency/Interim Assessment? (cont.)

## Once Safety Is Assessed and If Resources Are Available, Should I Order an Evaluation?

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card I Side 2

### An emergency/interim safety assessment should:

- be limited to an assessment of what measures are needed to minimize the risks to all concerned pending the resolution of the contested issues in the case;
- be conducted by a domestic violence and risk assessment expert; and
- consider, at a minimum, the advisability of the following alternatives:
  - ◆ suspending all contact between the parent whose behavior raises concerns and his or her partner and children until an interim hearing can be conducted, or pending a final resolution of the case;
  - ◆ providing for appropriately supervised visits; and/or
  - ◆ structuring the exchange of children in a safe setting with or without contact between the parents.

### The answer may be **YES** when:

- the facts trigger a statutory obligation to obtain an evaluation;
- there is a documented history of physical or sexual violence, stalking, or a pattern of assaultive or coercive behaviors perpetrated by one parent against the other, but you are nonetheless inclined to permit contact with the abusive parent; and/or
- there are allegations that a parent has harmed or threatened to harm him- or herself or the other parent or the children, threatened injury to property or pets, or otherwise abused the other parent or the children.

### The answer may *also* be **YES** when:

- The case has, as yet, no proven or alleged violence, but has other evidence or other allegations that raise "**RED FLAGS**" because of their common co-occurrence with domestic violence.

### **RED FLAGS** include:

- a documented history or allegations of mental illness, substance abuse, or child abuse by either party; \*
- a pattern of coercion and control even if there is no established history of physical or sexual violence;
- indications that the children are exhibiting symptoms consistent with, although not necessarily the result of, child abuse or their exposure to domestic violence. Such symptoms may include sleep disturbances, bedwetting, age-inappropriate separation anxiety, hyperactivity, aggression or other behavioral problems, depression, or anxiety; \*
- the presence of one or more prior court orders restricting a parent's access to a former partner or any of his or her children in this or another relationship;
- a history of court or social services involvement with the family;
- a stipulated or mediated agreement heavily favoring one party, thereby raising concerns of intimidation or coercion, especially if one or both of the parties are unrepresented; \*
- allegations that a parent is turning the children against the other parent; \* and
- indications that one or both parents are inattentive to the children's needs. \*

(See also Card 1, Side 1, **FACTORS**, and Card II, Side 2, **INFORMATION**.)

### And the answer may also be **YES** when:

- one or both parties have already retained one or more experts;
- one or both parties, or the children's lawyer or guardian *ad litem*, has requested an evaluation that raises concerns about domestic violence or raises "red flags" warranting an investigation of domestic violence; or
- a party seeking custody is also making a contested request to relocate, particularly if there is a hint that the case may involve domestic violence and safety concerns may be an underlying reason for the request. \*



## Safety First



## Frame the Inquiry



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

# Framing the Order: What Do I Need to Know, from Whom, and How Do I Ask?

**REMEMBER:** Not every case will require an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented litigants with a checklist of needed information, and assessing your own ability to make safe and responsible decisions in light of both the information you have and the information you do not.

### Your highest priority in framing your order, and the evaluator's highest priority in conducting the inquiry, is to make sure that:

- safety concerns that emerge in the course of the inquiry are promptly addressed; and
- no one is endangered by how the information is collected or shared.

### Investigation, Evaluation, Recommendation

You need information to guide your own application of the relevant legal principles and rules. Whom you choose to provide you with the information will be influenced by the type of information you need.

#### • Investigation: \*

You need an investigation when the questions are factual.

For example:

- ◆ "What has happened in this family?"
- ◆ "What do the relevant records show?"
- ◆ "What does the child say about visiting with his mother or father?"
- ◆ "What is the history of each parent's relationship with each child?" (e.g., who fed, clothed, etc., the children?)

#### • Evaluation: \*

You need an evaluation from a mental health professional to answer the following type of questions if they are relevant to the inquiry:

- ◆ "What is the psychological impact of parental behavior on a child?"
- ◆ "What are the personality, characteristics, functioning, or symptoms of a party or child?"
- ◆ "Are there clinical-level concerns about the mental health of one of the parents or the children?"

#### • Recommendations to the Court: \*

*Court practice is sharply divided on the question of asking evaluators or investigators to make recommendations. However, opinion is unanimous that the judges, not evaluators, make the ultimate best-interests determination.* If you or your court permits or requires custody evaluators to make recommendations, in order to make sure that you can make your own independent assessment, you must be able to determine:

- ◆ whether the recommendation is sufficiently supported by relevant facts;
- ◆ the level of support for the theory and methodology relied upon by the evaluator in his or her professional community; \* and
- ◆ whether the evaluator impermissibly tried to negotiate a resolution of the matter, either through counsel or directly with the parties.

**(See Card III, Side 2, ASSESSING THE RECOMMENDATIONS)**

## Choose the Expert

## Be Specific about the Information You Need

**\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.**

Card II Side 2

Continued on Card **IIA**

It is important to choose an evaluator who has training and experience in: \*

- ◆ the issues related to domestic violence and/or sexual assault, including the dangers associated with separation; \*
- ◆ the link between partner abuse and child abuse;
- ◆ the impact of exposure to domestic violence on children;
- ◆ the impact of abuse on parenting; and
- ◆ the psychological, emotional, physical, and economic risks that continued exposure to the abusive parent's behavior can have on the abused parent and the children.

You will also need to match the evaluator's training and skills to the particular inquiry:

- ◆ A case with extensive documentation may require the investigatory skills of an attorney.
- ◆ Obtaining sensitive information from relatively young children may require a mental health clinician with a background in child development and child psychology and up-to-date training on appropriate interviewing techniques.
- ◆ A mental health evaluation will require specialized expertise. The same is true for clinical diagnosis, in the rare case in which such diagnosis is a relevant and necessary aspect of the evaluation.
- ◆ Inquiries dependent upon a particular cultural competence, or specialized expertise in another area, such as substance abuse, will require someone with that competence or expertise.

Although the particular areas of inquiry may differ from case to case, areas that are usually important in a case in which domestic violence has or may have occurred, and that you will want to direct the expert to inquire into, include the following:

- any facts that would trigger a statutory presumption or specific statutory obligations;
- incidents of physical violence, sexual abuse, threats, stalking, or intimidation;
- destruction of property or abuse of pets or threats to do so;
- threats of homicide, suicide, serious bodily injury, or child abduction;
- unprovoked behaviors designed to make a parent fearful for the children's safety or fearful that the children will be abducted;
- patterns of coercive or controlling behavior, including emotionally abusive behavior; inappropriately limiting access to finances, education, or employment; and isolation from friends or family;
- behaviors that appear designed to, or likely to, undermine a parent's relationship with the children or capacity to parent effectively;
- the exposure of children to incidents of physical violence, sexual abuse, threats, stalking, or intimidation; \*
- the impact of all these behaviors on each parent, each child, and the relationship between each parent and each child; \*
- any specific cultural context that is relevant to the inquiry;
- a parent's immigration status used as a means to maintain coercive control over that parent;
- each parent's history of meeting each child's needs;
- the current situation and needs of each child;
- the nature of the communication between the parents;
- the record of any criminal or civil legal proceeding or police involvement; and
- short- and long-term safety concerns raised by the behavior of a parent. \*

**[See also Card I, Side 1, FACTORS, and Card I, Side 2, RED FLAGS.]**

# IIA

## Articulate Expected Sources of Information

## Communicate Expectations about Any Information- Gathering Procedures and Safety Practices

## Frame the Process

**\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.**

**Card IIA Side 1**

Evaluations that are based solely on interviewing and/or observing the parties and their children are significantly less reliable. You will want to ensure that evaluators supplement basic information with:

- interviews with relevant collaterals; \*
- a thorough review of all pertinent written records, assuming they are non-privileged or that any privilege attaching to them has been properly waived; \* and
- in extraordinary circumstances, psychological testing—although this, as explained in the supplementary materials, must be relevant and approached with caution. \*

**(See Card III, Side I, READ THE REPORT CRITICALLY)**

Evaluators must make the information-gathering process safe for all concerned, to avoid putting the parties or their children at risk or compromising the reliability of the information obtained. \*

Evaluators should:

- make initial contact with each party separately;
- reflect the safety needs of each family member in any guidelines for further contacts with both the adult parties and the children;
- respect the terms of existing restraining/protection orders;
- help unrepresented litigants understand the evaluation process, the risks of disclosing information that may be shared with the other party, and the risks of not disclosing information;
- advise the parties of an evaluator's duty to report suspected child abuse;
- whenever possible avoid identifying one party as the source of negative information about the other;
- warn the party at risk about disclosure of information in advance, if it becomes essential to share information with one party that may put the other at risk; \*
- avoid attributing direct quotes to children; and
- use specialized techniques and understanding to obtain and interpret information from children. \*

We propose that your order for a custody evaluation specifically include:

- the timeline with which you expect the evaluator and the parties or their attorneys to comply;
- the respective obligations of the parties, their attorneys, and the evaluator with respect to the completion of the evaluation;
- upon notice and opportunity to be heard, an order to produce records available to the courts but not directly available to the parties or their attorneys, including;
  - ◆ child protective services reports; and
  - ◆ criminal or court activity records;
- the assignment of costs of the evaluation and the costs of the parties' participation in the evaluation;
- the scope and purpose of the evaluation or investigation (you may want to invite input into the scope and purpose of the evaluation or investigation from the parties and their attorneys); and
- the specific questions you want answered in order to expedite the inquiry, to enhance the parties' safety and court efficiency, and to inform your decisions.

## Define the Obligations of the Parties

To facilitate the evaluation and increase the utility of the final product, articulate clearly the obligations of the parties, their attorneys, and the evaluator:

### A. The parties shall:

- provide information as requested and appropriate;
- sign requested consents or waivers after full consideration, and upon advice of counsel if represented, of the implications and advisability of waiving any privilege involved (make sure the parties have access to information in their language or to qualified translators, or that proper attention is given to a party's literacy); \*
- make themselves available to the evaluator; and
- provide the evaluator with access to their children.

### B. The attorneys shall:

- participate in defining the proposed scope and purpose of the evaluation or investigation;
- assist their clients in fulfilling their responsibilities, ensuring that they understand what information is being sought and from which sources;
- provide information and documentary material to the evaluator in an organized and timely fashion as authorized by their client or as directed by the court; and
- advise their clients about what information may be disclosed to the other party and what information may otherwise be placed in the public record of the case.

### C. The evaluator shall:

- ✎ make the safety of the parties and their children a priority at every stage of the process;
- accept the appointment only if qualified;
- accept the appointment only if unaffected by any conflict of interest;
- refrain from engaging in any conflicting professional relationship with anyone involved in the case after accepting the appointment; \*
- follow the terms of his or her licensure and any appropriate professional guidelines and standards;
- conduct the inquiry giving full consideration to the claims and concerns of each party;
- conduct the inquiry in a timely fashion;
- avoid creating situations that may violate the provisions of a restraining/protection order;
- with the permission of the court, draw on any necessary specialized resources; and
- refrain from negotiating a resolution of the matter, unless specifically instructed to do so by the court and with the knowledge of the parties and their attorneys.



*The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.*

*\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.*



## Safety First



## Determine Whether to Admit the Report into Evidence

## Read the Report Critically

(Note: The factors listed in this section could be used to determine the admissibility requirements under your state's rules of evidence.)



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card III Side 1

# Reading the Report

- Does the content of the report raise immediate concerns about the existing safety of the parties or their children?
- Does the fact that each party will be given access to the report raise additional safety concerns that should be addressed before the report is shared?

Apart from the task of framing final orders, immediate safety concerns may require you:

- to schedule a hearing pursuant to your state's laws and issue a restraining/protection order, or make a referral for safety planning or other needed services; or
- to involve child protective services in accordance with your state's reporting laws if you conclude from the report that a child is at imminent specific risk of physical or emotional harm.

It is important to remember that custody evaluation reports are a form of evidence, either written or oral, which requires an admissibility determination. Check your state's rules of evidence. See also the Federal Rules of Evidence (FRE): **FRE 401 and 402 (relevance), FRE 403 (probative value), and FRE 702 (experts).** (See supplemental material, PARENT ALIENATION AND THE DAUBERT STANDARD, p. 24.)

From the report, you should be able to determine whether the evaluator:

- **responded to each area of inquiry** detailed in your appointment order;
- **provided you with sufficient information to make a determination on the operative legal principles present in the case;**
- **described instances** where a child has directly witnessed, been exposed to, or been affected by incidents of domestic violence perpetrated by one party against the other;
- **explained the context of the evaluation**—i.e., at what point in the couple's separation process the evaluation took place and the possible impact of that timing on the findings and recommendations; and
- **properly reflected the limited scope of the task** assigned in cases where his or her function is one of investigation rather than evaluation.

To assess the weight to give to the report, you will need to determine whether the report contains sufficient information for you:

- **to rule on potential evidentiary concerns raised by the report:**
  - ◆ Was the information obtained directly from individuals interviewed, documents examined, or observations made by the evaluator? Is the source of each piece of information identified?
  - ◆ Is any information vulnerable to challenge because it was obtained "second-hand"? If so, is that indicated in the report?
  - ◆ Is the information in the report relevant to the legal issues raised by the case?
- **to assess the thoroughness of the factual investigation: \***
  - ◆ Have relevant collateral sources been interviewed?
  - ◆ Have relevant written records been reviewed?
  - ◆ Have important facts been corroborated?
- **to assess the accuracy of information from the parties and their children:**
  - 👤 Have the safety needs of each member of the family been recognized?
  - ◆ Has the evaluator avoided creating opportunities for intimidation and coercion?

## Read the Report Critically (cont.)

- **to determine whether the factual investigation has been even-handed:**
  - ◆ Can you determine if fair consideration was given to the claims and concerns of each of the parties, including giving each the opportunity to respond to allegations made by the other?
  - ◆ Does the report assess the strengths and deficiencies or vulnerabilities of each parent and each parent/child relationship?
  - ◆ Does the report consider the particular cultural context of the parties' parenting and the relationship between the parties and their children?
  - ◆ Has the evaluator explored all possible interpretations of the information?
- **to identify what information was not available, and why:**
  - ◆ Does the report allow you to determine the extent to which missing information limits the value of the evaluator's conclusions or recommendations?
- **to determine, in cases where the evaluator has conducted an investigation and analyzed, interpreted, or drawn conclusions from the data:**
  - ◆ that the evaluator has fully reported the underlying data, with each source identified and relevant documents or records attached?
  - ◆ that the evaluator has clearly distinguished between the facts and the analysis, interpretation, or conclusions he or she is deriving from them?
  - ◆ that the underlying data support the analyses, interpretations, or conclusions from which they are drawn?
- **to determine, in cases where an evaluator employs specialized mental health expertise:**
  - ◆ that the evaluator has the appropriate training, qualifications, and experience to employ any specialized data-gathering procedures used?
  - ◆ that any psychological tests administered offer relevant information and that the evaluator satisfactorily explained their relevance?
  - ◆ that the tests employed have received appropriate professional endorsement for use in this context (understanding that psychological testing is generally not appropriate in domestic violence situations)?
  - ◆ that the evaluator has the requisite mental health expertise to analyze, interpret and draw conclusions from the available data?

**(For more information on reading the report critically, see the supplemental information regarding confirmatory bias, page 25; see also Card IIA, Side 1, SOURCES OF INFORMATION, and corresponding supplemental material, page 19-21.)**

If domestic violence is identified as an issue, you will need to determine whether a qualified evaluator: \*

- ☞ demonstrated an understanding of the ongoing safety risks;
- offered recommendations that provide the security needed to allow healing from any existing trauma associated with abuse or exposure to abuse;
- considered the full range of protective options, including:
  - ◆ supporting relocation of the vulnerable party and the children to a secure location;
  - ◆ otherwise shielding the vulnerable party from contact with or direct communication from the abusive party;
  - ◆ placing total or partial, permanent or provisional, restrictions on contact between the abusive party and the children;
  - ◆ imposing formal or informal supervision of visitation, or of transfer/exchange; and
  - ◆ conditioning visitation rights on compliance with safety-related conditions; and
- offered recommendations that limit ongoing harassment or coercion.

**\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.**

**Card III Side 2**

## **Appendix F-1: PA Protection From Abuse Act**

**PENNSYLVANIA PROTECTION FROM ABUSE ACT**  
**23 PA.C.S.A. §§ 6101-6122**  
As Amended November 10, 2005

Section

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§ 6101. Short title of chapter

This chapter shall be known and may be cited as the Protection From Abuse Act.



§ 6102. Definitions

(a) GENERAL RULE.-- The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"ABUSE." The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parent-hood:

(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 63 (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).

"ADULT." An individual who is 18 years of age or older.

"CERTIFIED COPY." A paper copy of the original order of the issuing court endorsed by the appropriate clerk of that court or an electronic copy of the original order of the issuing court endorsed with a digital signature of the judge or appropriate clerk of that court. A raised seal on the copy of the order of the issuing court shall not be required.

"COMPARABLE COURT." A foreign court that:

(1) has subject matter jurisdiction and is authorized to issue ex parte, emergency, temporary or final protection orders in that jurisdiction; and

(2) possessed jurisdiction over the parties when the protection order was issued in that jurisdiction.

"CONFIDENTIAL COMMUNICATIONS." All information, whether written or spoken, transmitted between a victim and a domestic violence counselor or advocate in the course of the relationship. The term includes information received or given by the domestic violence counselor or advocate in the course of the relationship, as well as advice, reports, statistical data, memoranda or working papers, records or the like, given or made in the course of the relationship. The term also includes communications made by or to a linguistic interpreter assisting the victim, counselor or advocate in the course of the relationship.

"DOMESTIC VIOLENCE COUNSELOR/ADVOCATE." An individual who is engaged in a domestic violence program, the primary purpose of which is the rendering of counseling or assistance to victims of domestic violence, who has undergone 40 hours of training.

"DOMESTIC VIOLENCE PROGRAM." A nonprofit organization or program whose primary purpose is to provide services to domestic violence victims which include, but are not limited to, crisis hotline; safe homes or shelters; community education; counseling systems intervention and interface; transportation, information and referral; and victim assistance.

"FAMILY OR HOUSEHOLD MEMBERS." Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.

"FIREARM." Any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon as defined by 18 Pa.C.S. § 6105(i) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).

"FOREIGN PROTECTION ORDER." A protection order as defined by 18 U.S.C. § 2266 (relating to definitions) issued by a comparable court of another state, the District of Columbia, Indian tribe or territory, possession or commonwealth of the United States.

"HEARING OFFICER." A magisterial district judge, judge of the Philadelphia Municipal Court, bail commissioner appointed under 42 Pa.C.S. § 1123 (relating to jurisdiction and venue), master appointed under 42 Pa.C.S. § 1126 (relating to masters) and master for emergency relief.

"MASTER FOR EMERGENCY RELIEF." A member of the bar of the Commonwealth appointed under section 6110(e) (relating to emergency relief by minor judiciary).

"MINOR." An individual who is not an adult.

"OTHER WEAPON." Anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have. The term does not include a firearm.

"SAFEKEEPING PERMIT." A permit issued by a sheriff allowing a person to take possession of any firearm, other weapon or ammunition that a judge ordered a defendant to relinquish in a protection from abuse proceeding.

"SECURE VISITATION FACILITY." A court-approved visitation program offered in a facility with trained professional staff operated in a manner that safeguards children and parents from abuse and abduction.

"SHERIFF."

(1) Except as provided in paragraph (2), the sheriff of the county.

(2) In a city of the first class, the chief or head of the police department.

"VICTIM." A person who is physically or sexually abused by a family or household member. For purposes of section 6116 (relating to confidentiality), a victim 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. The term shall also include 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.

"WEAPON." Anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have. The term includes a firearm which is not loaded or lacks a magazine, clip or other components to render it immediately operable and components which can readily be assembled into a weapon as defined by 18 Pa.C.S. § 907 (relating to possessing instruments of crime).

(b) OTHER TERMS.-- Terms not otherwise defined in this chapter shall have the meaning given to them in 18 Pa.C.S. (relating to crimes and offenses).

#### § 6103. Jurisdiction

(a) GENERAL RULE.-- The court shall have jurisdiction over all proceedings under this chapter.

(b) EFFECT OF DEPARTURE AND NONRESIDENCE.-- The right of the plaintiff to relief under this chapter shall not be affected by either of the following:

(1) The plaintiff's leaving the residence or household to avoid further abuse.

(2) The defendant's absence from this Commonwealth or the defendant's nonresidence in this Commonwealth, provided that the court has personal jurisdiction over the defendant in accordance with 42 Pa.C.S. § 5322 (relating to bases of personal jurisdiction over persons outside this Commonwealth).

§ 6104. Full faith and credit and foreign protection orders

(a) GENERAL RULE.-- A court shall recognize and enforce a valid foreign protection order issued by a comparable court. The validity of a foreign protection order shall only be determined by a court.

(b) AFFIRMATIVE DEFENSE.-- Failure by a comparable court to provide reasonable notice and opportunity to be heard shall be an affirmative defense to any charge or process filed seeking enforcement of a foreign protection order. A comparable court shall have complied with that court's notice requirements and shall have given the defendant the opportunity to be heard before the foreign order was issued. In the case of ex parte orders, the comparable court shall have complied with that court's notice requirements and have given the defendant an opportunity to be heard within a reasonable period of time after the order was issued, consistent with due process.

(c) INVALID ORDERS.-- A foreign protection order issued by a comparable court against a party who has filed a petition, complaint or other written pleading for a protection order is not valid and not entitled to full faith and credit if:

(1) no cross or counter petition, complaint or other written pleading was filed seeking the protection order; or

(2) a cross or counter petition, complaint or other written pleading was filed and the court did not make a specific finding that each party was entitled to a protection order.

(d) FILING A FOREIGN PROTECTION ORDER.-- A plaintiff may file a certified copy of a foreign protection order with the prothonotary in any county within this Commonwealth where the plaintiff believes enforcement may be necessary. The following provisions shall apply:

(1) No costs or fees associated with filing a foreign protection order shall be assigned to the plaintiff, including the cost of obtaining certified copies of the order. Costs and fees associated with filing a foreign protection order may be assessed against the defendant.

(2) Upon filing of a foreign protection order, a prothonotary shall transmit, in a manner prescribed by the Pennsylvania State Police, a copy of the order to the Pennsylvania State Police registry of protection orders.

(3) Filing of a foreign protection order shall not be a prerequisite for service and enforcement.

(e) ORDERS ISSUED IN ANOTHER JUDICIAL DISTRICT WITHIN THIS COMMONWEALTH.-- The filing of an order issued in another judicial district within this Commonwealth is not required for enforcement purposes.

### § 6105. Responsibilities of law enforcement agencies

(a) GENERAL RULE.-- The police department of each municipal corporation, the Pennsylvania State Police and the sheriff of each county shall insure that all their officers, deputies and employees are familiar with the provisions of this chapter. Instruction concerning protection from abuse shall be made a part of the training curriculum for all trainee officers and deputies. All law enforcement agencies within this Commonwealth shall adopt a written domestic violence policy.

(b) NOTICE OF SERVICES AND RIGHTS.-- Each law enforcement agency shall provide the abused person with oral and written notice of the availability of safe shelter and of domestic violence services in the community, including the hotline number for domestic violence services. The written notice, which shall be in English and Spanish and any additional language required by local rule of court, shall include the following statement:

"If you are the victim of domestic violence, you have the right to go to court and file a petition requesting an order for protection from domestic abuse pursuant to the Protection From Abuse Act (23 Pa.C.S. Ch. 61), which could include the following:

(1) An order restraining the abuser from further acts of abuse.

(2) An order directing the abuser to leave your household.

(3) An order preventing the abuser from entering your residence, school, business or place of employment.

(4) An order awarding you or the other parent temporary custody of or temporary visitation with your child or children.

(5) An order directing the abuser to pay support to you and the minor children if the abuser has a legal obligation to do so."

(c) MANDATORY REPORT.-- Each law enforcement agency shall make an incident report, on a form prescribed by the Pennsylvania State Police, consistent with the report required by the Federal National Incident-Based Reporting System (NIBRS). The mandate for incident report completion shall not be operative until the Pennsylvania State Police have implemented NIBRS. The incident report may include the following:

(1) Names, addresses and telephone numbers of the victim, the accused, any witnesses and the caller.

(2) A second permanent address and telephone number for the victim, such as a close family member or a friend.

(3) A statement of the relationship between the victim and the accused.

(4) A narrative for the incident, including the date, time and whether the accused appeared intoxicated or under the influence of a controlled substance.

(5) What, if any, weapons were used or threatened to be used.

(6) A description of any injuries observed by the officer.

(7) A description of any injuries described by the victim but not observed by the officer and an indication that the injury was not observed.

(8) Documentation of any evidence that would tend to establish that a crime was committed.

(9) An indication of whether an arrest was made and the reason for electing not to arrest, whether there was a warrantless arrest, an arrest with a warrant or no arrest.

(10) Whether the accused actually was arrested or whether there is an outstanding arrest warrant.

(11) The crimes with which the accused was charged.

(12) If the accused was arrested and arraigned, whether bail was set and any conditions of bail imposed.

(13) If the officer did not arrest or seek an arrest warrant even though arrest was authorized, a detailed explanation of the reasons for the officer's decision not to arrest.

(14) The names and ages of any children present in the household and their address and telephone number if children were relocated.

(15) Notation of previous incidents of which the officer is personally aware.

(16) Notation of previous incidents reported by the victim or witnesses.

(17) If an officer was injured in the incident, the nature and circumstances of the injury.

(d) NOTICE OF ARREST.-- All law enforcement agencies shall make reasonable efforts to notify any adult or emancipated minor protected by an order issued under this chapter of the arrest of the defendant for violation of an order as soon as possible. Unless the person cannot be located, notice of the arrest shall be provided not more than 24 hours after preliminary arraignment.

(e) STATEWIDE REGISTRY.--

(1) The Pennsylvania State Police shall establish a Statewide registry of protection orders and shall maintain a complete and systematic record and index of all valid temporary and final court orders of protection, court-approved consent agreements and a foreign protection order filed pursuant to section 6104(d) (relating to full faith and credit and foreign protection orders). The Statewide registry shall include, but need not be limited to, the following:

(i) The names of the plaintiff and any protected parties.

(ii) The name and address of the defendant.

(iii) The relationship between the plaintiff and defendant.

(iv) The date the order was entered.

(v) The date the order expires.

(vi) The relief granted under sections 6108(a)(1), (2), (4), (6) and (7) (relating to relief) and 6110(a) (relating to emergency relief by minor judiciary).

(vii) The judicial district in which the order was entered.

(viii) Where furnished, the Social Security number and date of birth of the defendant.

(ix) Whether or not any or all firearms, other weapons or ammunition were ordered relinquished.

(2) The prothonotary shall send, on a form prescribed by the Pennsylvania State Police, a copy of the protection order or approved consent agreement to the Statewide registry of

protection orders so that it is received within 24 hours of the entry of the order. Likewise, amendments to or revocation of an order shall be transmitted by the prothonotary within 24 hours of the entry of the order for modification or revocation. The Pennsylvania State Police shall enter orders, amendments and revocations in the Statewide registry of protection orders within eight hours of receipt. Vacated or expired orders shall be purged from the registry.

(3) The registry of the Pennsylvania State Police shall be available at all times to inform courts, dispatchers and law enforcement officers of any valid protection order involving any defendant.

(4) When an order granting relief under section 6108(a)(7) has been entered by a court, such information shall be available to the Pennsylvania State Police for the purpose of conducting a criminal history records check in compliance with the applicable provisions of 18 Pa.C.S. Ch. 61 Subch. A (relating to Uniform Firearms Act).

(5) Information contained in the Statewide registry shall not be subject to access under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

(f) INFORMATION CONCERNING CRIMES OF VIOLENCE.-- Each police department in a city, borough or township and the Pennsylvania State Police shall transmit to the Pennsylvania State Police, in a manner prescribed by the Pennsylvania State Police, the information specified in subsection (c) related to crimes of violence between family or household members.

(g) ANNUAL REPORT.-- The Pennsylvania State Police shall annually compile and analyze the incident report data received and publish a Statewide report which includes aggregate, county and department-based statistical profiles. The Pennsylvania State Police shall transmit a copy of the annual report to the Governor, the General Assembly and each domestic violence program in this Commonwealth.

(h) ENFORCEMENT OF FOREIGN PROTECTION ORDERS.--

(1) All foreign protection orders shall have the presumption of validity in this Commonwealth, and police officers shall make arrests for violations thereof in the same manner as set for violations of protection orders issued within this Commonwealth. Until a foreign order is declared to be invalid by a court, it shall be enforced by all law enforcement personnel in this Commonwealth.

(2) A police officer shall rely upon any copy of a foreign protection order which has been presented to the officer by any source and may verify the existence of a protection order consistent with the provisions of section 6113(a) (relating to arrest for violation of order). The fact that a foreign protection order has not been filed with a prothonotary or



entered into the Pennsylvania State Police registry shall not be grounds for law enforcement to refuse to enforce the order.

(i) IMMUNITY.-- The following entities shall be immune from civil liability for good faith conduct in any action arising in connection with a court's finding that the foreign order is invalid or unenforceable:

- (1) Law enforcement agencies and their agents and employees.
- (2) County correctional and detention facilities and their agents and employees.
- (3) Prothonotaries and their agents and employees.

#### § 6106. Commencement of proceedings

(a) GENERAL RULE.-- An adult or an emancipated minor may seek relief under this chapter for that person or any parent, adult household member or guardian ad litem may seek relief under this chapter on behalf of minor children, or a guardian of the person of an adult who has been declared incompetent under 20 Pa.C.S. Ch. 51 Subch. B (relating to appointment of guardian) may seek relief on behalf of the incompetent adult, by filing a petition with the court alleging abuse by the defendant.

(A.1) FALSE REPORTS.-- A person who knowingly gives false information to any law enforcement officer with the intent to implicate another under this chapter commits an offense under 18 Pa.C.S. § 4906 (relating to false reports to law enforcement authorities).

(A.2) NOTIFICATION OF DEFENDANT'S OCCUPATION.-- The plaintiff shall notify the court if the plaintiff has reason to believe that the defendant is a licensed firearms dealer, is employed by a licensed firearms dealer or manufacturer, is employed as a writer, researcher or technician in the firearms or hunting industry or is required to carry a firearm as a condition of employment.

(b) PLAINTIFF FEES NOT PERMITTED.-- No plaintiff seeking relief under this chapter shall be charged any fees or costs associated with the filing, issuance, registration or service of a petition, motion, complaint, order or any other filing. Prohibited fees or costs shall include, but are not limited to, those associated with modifying, withdrawing, dismissing or certifying copies of a petition, motion, complaint, order or any other filing, as well as any judicial surcharge or computer system fee. No plaintiff seeking relief under this chapter shall be charged any fees or costs associated with filing a motion for reconsideration or an appeal from any order or action taken pursuant to this chapter. Nothing in this subsection is intended to expand or diminish the court's authority to enter an order

pursuant to Pa.R.C.P. No. 1023.1 (relating to Scope. Signing of Documents. Representations to the Court. Violation).

(c) ASSESSMENT OF FEES AND COSTS AGAINST THE DEFENDANT.-- When an order is granted pursuant to this chapter, fees and costs shall be assessed against the defendant. The court shall waive fees and costs upon a showing of good cause or when the court makes a finding that the defendant is not able to pay the costs. Nothing in this subsection is intended to expand or diminish the court's authority to enter an order pursuant to Pa.R.C.P. No. 1023.1.

(d) SURCHARGE ON ORDER.-- When a protection order is granted under section 6107(a) (relating to hearings), other than pursuant to an agreement of the parties, a surcharge of \$ 100 shall be assessed against the defendant. All moneys received from surcharges shall be distributed in the following order of priority:

(1) \$ 25 shall be forwarded to the Commonwealth and shall be appropriated to the Pennsylvania State Police to establish and maintain the Statewide registry of protection orders provided for in section 6105.

(2) \$ 50 shall be retained by the county and shall be used to carry out the provisions of this chapter as follows:

(i) \$ 25 shall be used by the sheriff.

(ii) \$ 25 shall be used by the court.

(3) \$ 25 shall be forwarded to the Department of Public Welfare for use for victims of domestic violence in accordance with the provisions of section 2333 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.

(D.1) LIMITATION.-- The surcharge allocated under subsection (d)(1) and (3) shall be used to supplement and not to supplant any other source of funds received for the purpose of carrying out the provisions of this chapter.

(e) COURT TO ADOPT MEANS OF SERVICE.-- The court shall adopt a means of prompt and effective service in those instances where the plaintiff avers that service cannot be safely effected by an adult individual other than a law enforcement officer or where the court so orders.

(f) SERVICE BY SHERIFF.-- If the court so orders, the sheriff or other designated agency or individual shall serve the petition and order.

(g) SERVICE OF PETITION AND ORDERS.-- The petition and orders shall be served upon the defendant, and orders shall be served upon the police departments and sheriff

with appropriate jurisdiction to enforce the orders. Orders shall be promptly served on the police and sheriff. Failure to serve shall not stay the effect of a valid order.

(G.1) SERVICE OF ORIGINAL PROCESS OF A FOREIGN PROTECTION ORDER.-- No plaintiff or petitioner shall be charged any costs or fees associated with the service of original process of a foreign protection order. Costs or fees associated with the service of original process of a foreign protection order may be assessed against the defendant.

(h) ASSISTANCE AND ADVICE TO PLAINTIFF.-- The courts and hearing officers shall:

(1) Provide simplified forms and clerical assistance in English and Spanish to help with the writing and filing of the petition for a protection order for an individual not represented by counsel.

(2) Provide the plaintiff with written and oral referrals, in English and Spanish, to the local domestic violence program, to the local legal services office and to the county bar association's lawyer referral service.

#### § 6107. Hearings

(a) GENERAL RULE.-- Within ten business days of the filing of a petition under this chapter, a hearing shall be held before the court, at which the plaintiff must prove the allegation of abuse by a preponderance of the evidence. The court shall, at the time the defendant is given notice of the hearing, advise the defendant of the right to be represented by counsel, of the possibility that any firearm, other weapon or ammunition owned and any firearm license possessed may be ordered temporarily relinquished, of the options for relinquishment of a firearm pursuant to this chapter, of the possibility that Federal law may prohibit the possession of firearms, including an explanation of 18 U.S.C. § 922(g)(8) (relating to unlawful acts), and that any protection order granted by a court may be considered in any subsequent proceedings under this title. This notice shall be printed and delivered in a manner which easily attracts attention to its content and shall specify that child custody is one of the proceedings where prior protection orders may be considered.

(b) TEMPORARY ORDERS.--

(1) If a plaintiff petitions for temporary order for protection from abuse and alleges immediate and present danger of abuse to the plaintiff or minor children, the court shall conduct an ex parte proceeding.

(2) The court may enter such a temporary order as it deems necessary to protect the plaintiff or minor children when it finds they are in immediate and present danger of abuse. The order shall remain in effect until modified or terminated by the court after notice and hearing.

(3) In addition to any other relief, the court may, pursuant to section 6108 (relating to relief), direct that the defendant temporarily relinquish to the sheriff any firearms, other weapons or ammunition for the duration of the temporary order if the petition demonstrates any of the following:

(i) Abuse which involves a firearm or other weapon.

(ii) An immediate and present danger of abuse. In determining whether an immediate and present danger of abuse exists, the court shall consider a number of factors, including, but not limited to:

(A) Whether the temporary order of protection from abuse is not likely to achieve its purpose in the absence of such a condition.

(B) Whether the defendant has previously violated a protection from abuse order.

(C) Whether past or present abuse to the plaintiff or any of the plaintiff's minor children resulted in injury.

(D) Whether the abuse occurred in public.

(E) Whether the abuse includes:

(I) threats of abuse or suicide;

(II) killing or threatening to kill pets;

(III) an escalation of violence;

(IV) stalking or obsessive behavior;

(V) sexual violence; or

(VI) drug or excessive alcohol use.

(4) If the court orders the defendant to temporarily relinquish any firearm, other weapon or ammunition pursuant to paragraph (3), the defendant shall decide in what manner the defendant is going to relinquish any firearm, other weapon or ammunition listed in the order. Relinquishment may be to the sheriff pursuant to section 6108(a)(7)

or to a third party for safekeeping pursuant to section 6108.3 (relating to relinquishment to third party for safekeeping).

(c) CONTINUED HEARINGS.-- If a hearing under subsection (a) is continued and no temporary order is issued, the court may make ex parte temporary orders under subsection (b) as it deems necessary.

## § 6108. Relief

(a) GENERAL RULE.-- The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include:

(1) Directing the defendant to refrain from abusing the plaintiff or minor children.

(2) Granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant or restoring possession to the plaintiff if the residence or household is jointly owned or leased by the parties, is owned or leased by the entirety or is owned or leased solely by the plaintiff.

(3) If the defendant has a duty to support the plaintiff or minor children living in the residence or household and the defendant is the sole owner or lessee, granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant or restoring possession to the plaintiff or, with the consent of the plaintiff, ordering the defendant to provide suitable alternate housing.

(4) Awarding temporary custody of or establishing temporary visitation rights with regard to minor children. In determining whether to award temporary custody or establish temporary visitation rights pursuant to this paragraph, the court shall consider any risk posed by the defendant to the children as well as risk to the plaintiff. The following shall apply:

(i) A defendant shall not be granted custody, partial custody or unsupervised visitation where it is alleged in the petition, and the court finds after a hearing under this chapter, that the defendant:

(A) abused the minor children of the parties or poses a risk of abuse toward the minor children of the parties; or

(B) has been convicted of violating 18 Pa.C.S. § 2904 (relating to interference with custody of children) within two calendar years prior to the filing of the petition for protection order or that the defendant poses a risk of violating 18 Pa.C.S. § 2904.

(ii) Where the court finds after a hearing under this chapter that the defendant has inflicted abuse upon the plaintiff or a child, the court may require supervised custodial access by a third party. The third party must agree to be accountable to the court for supervision and execute an affidavit of accountability.

(iii) Where the court finds after a hearing under this chapter that the defendant has inflicted serious abuse upon the plaintiff or a child or poses a risk of abuse toward the plaintiff or a child, the court may:

(A) award supervised visitation in a secure visitation facility; or

(B) deny the defendant custodial access to a child.

(iv) If a plaintiff petitions for a temporary order under section 6107(b) (relating to hearings) and the defendant has partial, shared or full custody of the minor children of the parties by order of court or written agreement of the parties, the custody shall not be disturbed or changed unless the court finds that the defendant is likely to inflict abuse upon the children or to remove the children from the jurisdiction of the court prior to the hearing under section 6107(a). Where the defendant has forcibly or fraudulently removed any minor child from the care and custody of a plaintiff, the court shall order the return of the child to the plaintiff unless the child would be endangered by restoration to the plaintiff.

(v) Nothing in this paragraph shall bar either party from filing a petition for custody under Chapter 53 (relating to custody) or under the Pennsylvania Rules of Civil Procedure.

(vi) In order to prevent further abuse during periods of access to the plaintiff and child during the exercise of custodial rights, the court shall consider, and may impose on a custody award, conditions necessary to assure the safety of the plaintiff and minor children from abuse.

(5) After a hearing in accordance with section 6107(a), directing the defendant to pay financial support to those persons the defendant has a duty to support, requiring the defendant, under sections 4324 (relating to inclusion of medical support) and 4326 (relating to mandatory inclusion of child medical support), to provide health coverage for the minor child and spouse, directing the defendant to pay all of the unreimbursed medical expenses of a spouse or minor child of the defendant to the provider or to the plaintiff when he or she has paid for the medical treatment, and directing the defendant to make or continue to make rent or mortgage payments on the residence of the plaintiff to the extent that the defendant has a duty to support the plaintiff or other dependent household members. The support order shall be temporary, and any beneficiary of the order must file a complaint for support under the provisions of Chapters 43 (relating to support matters generally) and 45 (relating to reciprocal enforcement of support orders) within two weeks of the date of the issuance of the protection order. If a complaint for support is not filed,

that portion of the protection order requiring the defendant to pay support is void. When there is a subsequent ruling on a complaint for support, the portion of the protection order requiring the defendant to pay support expires.

(6) Prohibiting the defendant from having any contact with the plaintiff or minor children, including, but not limited to, restraining the defendant from entering the place of employment or business or school of the plaintiff or minor children and from harassing the plaintiff or plaintiff's relatives or minor children.

(7) Ordering the defendant to temporarily relinquish to the sheriff the defendant's other weapons and ammunition which have been used or been threatened to be used in an incident of abuse against the plaintiff or the minor children and the defendant's firearms and prohibiting the defendant from acquiring or possessing any firearm for the duration of the order and requiring the defendant to relinquish to the sheriff any firearm license, issued under section 6108.3 (relating to relinquishment to third party for safekeeping) or 18 Pa.C.S. § 6106 (relating to firearms not to be carried without a license) or 6109 (relating to licenses) the defendant may possess. A copy of the court's order shall be transmitted to the chief or head of the police force or police department of the municipality and to the sheriff of the county of which the defendant is a resident. When relinquishment is ordered, the following shall apply:

(i)(A) The court's order shall require the defendant to relinquish such firearms, other weapons, ammunition and any firearm license pursuant to the provisions of this chapter within 24 hours of service of a temporary order or the entry of a final order or the close of the next business day as necessary by closure of the sheriffs' offices, except for cause shown at the hearing, in which case the court shall specify the time for relinquishment of any or all of the defendant's firearms.

(B) A defendant subject to a temporary order requiring the relinquishment of firearms, other weapons or ammunition shall, in lieu of relinquishing specific firearms, other weapons or ammunition which cannot reasonably be retrieved within the time for relinquishment in clause (A) due to their current location, provide the sheriff with an affidavit listing the firearms, other weapons or ammunition and their current location. If the defendant, within the time for relinquishment in clause (A), fails to provide the affidavit or fails to relinquish, pursuant to this chapter, any firearms, other weapons or ammunition ordered to be relinquished which are not specified in the affidavit, the sheriff shall, at a minimum, provide immediate notice to the court, the plaintiff and appropriate law enforcement authorities. The defendant shall not possess any firearms, other weapons or ammunition specifically listed in the affidavit provided to the sheriff pursuant to this clause for the duration of the temporary order.

(C) As used in this subparagraph, the term "cause" shall be limited to facts relating to the inability of the defendant to retrieve a specific firearm within 24 hours due to the current location of the firearm.

(ii) The court's order shall contain a list of any firearm, other weapon or ammunition ordered relinquished. Upon the entry of a final order, the defendant shall inform the court in what manner the defendant is going to relinquish any firearm, other weapon or ammunition ordered relinquished. Relinquishment may occur pursuant to section 6108.2 (relating to relinquishment for consignment sale, lawful transfer or safekeeping) or 6108.3 or to the sheriff pursuant to this paragraph. Where the sheriff is designated, the sheriff shall secure custody of the defendant's firearms, other weapons or ammunition and any firearm license listed in the court's order for the duration of the order or until otherwise directed by court order. In securing custody of the defendant's relinquished firearms, the sheriff shall comply with 18 Pa.C.S. § 6105(f)(4) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms). In securing custody of the defendant's other weapons and ammunition, the sheriff shall provide the defendant with a signed and dated written receipt which shall include a detailed description of the other weapon or ammunition and its condition.

(iii) The sheriff shall provide the plaintiff with the name of the person to which any firearm, other weapon or ammunition was relinquished.

(iv) Unless the defendant has complied with subparagraph (i)(B) or section 6108.2 or 6108.3, if the defendant fails to relinquish any firearm, other weapon, ammunition or firearm license within 24 hours or upon the close of the next business day due to closure of sheriffs' offices or within the time ordered by the court upon cause being shown at the hearing, the sheriff shall, at a minimum, provide immediate notice to the court, the plaintiff and appropriate law enforcement agencies.

(v) Any portion of any order or any petition or other paper which includes a list of any firearm, other weapon or ammunition ordered relinquished shall be kept in the files of the court as a permanent record thereof and withheld from public inspection except:

(A) upon an order of the court granted upon cause shown;

(B) as necessary, by law enforcement and court personnel; or

(C) after redaction of information listing any firearm, other weapon or ammunition.

(vi) As used in this paragraph, the term "defendant's firearms" shall, if the defendant is a licensed firearms dealer, only include firearms in the defendant's personal firearms collection pursuant to 27 CFR § 478.125a (relating to personal firearms collection).

(7.1) If the defendant is a licensed firearms dealer, ordering the defendant to follow such restrictions as the court may require concerning the conduct of his business, which may include ordering the defendant to relinquish any Federal or State license for the sale, manufacture or importation of firearms as well as firearms in the defendant's business



inventory. In restricting the defendant pursuant to this paragraph, the court shall make a reasonable effort to preserve the financial assets of the defendant's business while fulfilling the goals of this chapter.

(8) Directing the defendant to pay the plaintiff for reasonable losses suffered as a result of the abuse, including medical, dental, relocation and moving expenses; counseling; loss of earnings or support; costs of repair or replacement of real or personal property damaged, destroyed or taken by the defendant or at the direction of the defendant; and other out-of-pocket losses for injuries sustained. In addition to out-of-pocket losses, the court may direct the defendant to pay reasonable attorney fees. An award under this chapter shall not constitute a bar to litigation for civil damages for injuries sustained from the acts of abuse giving rise to the award or a finding of contempt under this chapter.

(9) Directing the defendant to refrain from stalking or harassing the plaintiff and other designated persons as defined in 18 Pa.C.S. § 2709 (relating to harassment) and 2709.1 (relating to stalking).

(10) Granting any other appropriate relief sought by the plaintiff.

(b) IDENTIFYING INFORMATION.-- Any order issued under this section shall, where furnished by either party, specify the Social Security number and date of birth of the defendant.

(c) MUTUAL ORDERS OF PROTECTION.-- Mutual orders of protection shall not be awarded unless both parties have filed timely written petitions, complied with service requirements under section 6106 (relating to commencement of proceedings) and are eligible for protection under this chapter. The court shall make separate findings and, where issuing orders on behalf of both petitioners, enter separate orders.

(d) DURATION AND AMENDMENT OF ORDER OR AGREEMENT.-- A protection order or approved consent agreement shall be for a fixed period of time not to exceed three years. The court may amend its order or agreement at any time upon subsequent petition filed by either party.

(e) EXTENSION OF PROTECTION ORDERS.--

(1) An extension of a protection order may be granted:

(i) Where the court finds, after a duly filed petition, notice to the defendant and a hearing, in accordance with the procedures set forth in sections 6106 and 6107, that the defendant committed one or more acts of abuse subsequent to the entry of the final order or that the defendant engaged in a pattern or practice that indicates continued risk of harm to the plaintiff or minor child.

(ii) When a contempt petition or charge has been filed with the court or with a hearing officer in Philadelphia County, but the hearing has not occurred before the expiration of the protection order, the order shall be extended, at a minimum, until the disposition of the contempt petition and may be extended for another term beyond the disposition of the contempt petition.

(2) Service of an extended order shall be made in accordance with section 6109 (relating to service of orders).

(3) There shall be no limitation on the number of extensions that may be granted.

(f) SUPPORT PROCEDURE.-- The domestic relations section shall enforce any support award in a protection order where the plaintiff files a complaint for support under subsection (a)(5).

(g) NOTICE.-- Notice shall be given to the defendant, in orders issued under this section, stating that violations of an order will subject the defendant to arrest under section 6113 (relating to arrest for violation of order) or contempt of court under section 6114 (relating to contempt for violation of order or agreement). Resumption of coresidency on the part of the plaintiff and defendant shall not nullify the provisions of the court order.

(h) TITLE TO REAL PROPERTY UNAFFECTED.-- No order or agreement under this chapter shall in any manner affect title to any real property.

#### § 6108.1. Return of relinquished firearms, other weapons and ammunition and additional relief

(a) GENERAL RULE.-- Any court order requiring the relinquishment of firearms, other weapons or ammunition shall provide for the return of the relinquished firearms, other weapons or ammunition to the defendant upon expiration of the order or dismissal of a petition for a protection from abuse order. The defendant may take custody of the firearms, other weapons and ammunition provided that the defendant is otherwise eligible to lawfully possess the relinquished items. The defendant shall not be required to pay any fees, costs or charges associated with the returns, whether those fees, costs or charges are imposed by the Pennsylvania State Police, any local law enforcement agency or any other entity, including a licensed importer, licensed manufacturer or licensed dealer in order to secure return of the relinquished firearms, other weapons or ammunition.

(b) MODIFICATION OF COURT'S ORDER PROVIDING FOR RETURN OF RELINQUISHED FIREARM, OTHER WEAPON OR AMMUNITION.--

(1) The defendant may petition the court to allow for the return of firearms, other weapons and ammunition to the defendant prior to the expiration of the court's order. The

petition shall be served upon the plaintiff and the plaintiff shall be a party to the proceedings regarding that petition.

(2) Any other person may petition the court to allow for the return of that other person's firearms, other weapons and ammunition prior to the expiration of the court's order. The petition shall be served upon the plaintiff, and the plaintiff shall be given notice and an opportunity to be heard regarding that petition.

(c) MODIFICATION OF COURT'S ORDER TO PROVIDE FOR ALTERNATIVE MEANS OF RELINQUISHING FIREARMS, OTHER WEAPONS OR AMMUNITION.-- The defendant may petition the court for modification of the order to provide for an alternative means of relinquishment in accordance with this chapter. The petition shall be served upon the plaintiff, and the plaintiff shall have an opportunity to be heard at the hearing as provided in subsection (d). Where the court orders a modification pursuant to this subsection providing for alternative means of relinquishment, the sheriff shall proceed as directed by the court.

(d) HEARING.-- Within ten business days of the filing of any petition under this section, a hearing shall be held before the court.

(e) DEFINITIONS.-- As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Other person." Any person, except the defendant, who is the lawful owner of a firearm, other weapon or ammunition relinquished pursuant to this chapter.

"Safekeeping." The secure custody of a firearm, other weapon or ammunition ordered relinquished by an active protection from abuse order.

## § 6108.2. Relinquishment for consignment sale, lawful transfer or safekeeping

(a) GENERAL RULE.-- Notwithstanding any other provision of law, a defendant who is the subject of a final protection from abuse order, which order provides for the relinquishment of firearms, other weapons or ammunition during the period of time the order is in effect may, within the time frame specified in the order and in lieu of relinquishment to the sheriff, relinquish to a dealer licensed pursuant to *18 Pa.C.S. § 6113* (relating to licensing of dealers) any firearms, other weapons or ammunition for consignment sale, lawful transfer or safekeeping.

(b) AFFIDAVIT.-- A defendant relinquishing firearms, other weapons or ammunition to a dealer pursuant to subsection (a) shall obtain an affidavit from the dealer on a form prescribed by the Pennsylvania State Police which shall include, at a minimum, the following:

- (1) The caption of the case in which the protection from abuse order was issued.
- (2) The name, address, date of birth and Social Security number of the defendant.
- (3) A list of the firearms, other weapons or ammunition, including, if applicable, the manufacturer, model and serial number.
- (4) The name and license number of the dealer licensed pursuant to 18 Pa.C.S. § 6113 and the address of the licensed premises.

(5) An acknowledgment that the firearms, other weapons or ammunition will not be returned to the defendant or sold or transferred to a person the dealer knows is a member of the defendant's household, while the defendant is the subject of an active protection from abuse order pursuant to section 6108, which order provides for the relinquishment of the firearm, other weapon or ammunition being returned, sold or transferred.

(6) An acknowledgment that the firearms, other weapons or ammunition, if sold or transferred, will be sold or lawfully transferred in compliance with 18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles).

(c) FAILURE TO PROVIDE AFFIDAVIT.-- A defendant relinquishing firearms, other weapons or ammunition to a dealer pursuant to subsection (a) shall, within the time frame specified in the order for relinquishing firearms, other weapons or ammunition, provide to the sheriff the affidavit obtained pursuant to subsection (b) and relinquish to the sheriff any firearms, other weapons or ammunition ordered to be relinquished which are not specified in the affidavit, in an affidavit provided in accordance with section 6108(a)(7)(i)(B) (relating to relief) or in an acknowledgment of receipt from a third party provided to the sheriff pursuant to section 6108.3 (relating to relinquishment to third party for safekeeping). If the defendant fails to comply with this subsection, the sheriff shall, at a minimum, provide immediate notice to the court, the plaintiff and appropriate law enforcement agencies.

(d) FORM.-- The Pennsylvania State Police shall develop and make available a form to be used by dealers to accept possession of firearms, other weapons and ammunition for consignment sale, lawful transfer or safekeeping pursuant to this section.

(e) TRANSFER UPON ENTRY OF FINAL ORDER.-- Upon entry of a final protection from abuse order issued pursuant to section 6108, which order provides for the relinquishment of firearms, other weapons or ammunition during the period of time the order is in effect, a defendant who had relinquished firearms, other weapons or ammunition to the sheriff pursuant to a temporary order may request that the firearms, other weapons or ammunition be relinquished to a dealer for consignment sale, lawful transfer or safekeeping pursuant to this section. If the defendant can identify a licensed dealer willing to ac-

cept the firearms, other weapons or ammunition in compliance with this section, the court shall order the sheriff to transport the firearms, other weapons or ammunition to the licensed dealer at no cost to the defendant or the licensed dealer.

(f) NONDISCLOSURE.-- The affidavit obtained under subsection (c) shall not be subject to access under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

(g) DEFINITIONS.-- As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Safekeeping." The secure custody of firearms, other weapons or ammunition ordered relinquished by an active protection from abuse order.

"Sale or lawful transfer." Any sale or transfer to a person other than the defendant or a member of the defendant's household which is conducted in accordance with 18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles).

### § 6108.3. Relinquishment to third party for safekeeping

(a) GENERAL RULE.-- A defendant who is the subject of a protection from abuse order, which order provides for the relinquishment of firearms, other weapons or ammunition during the period of time the order is in effect, may, within the time frame specified in the order and in lieu of relinquishment to the sheriff, relinquish any firearms, other weapons or ammunition to a third party for safekeeping.

#### (b) TRANSFER TO THIRD PARTY.--

(1) A defendant wishing to relinquish firearms, other weapons or ammunition to a third party pursuant to subsection (a) shall, within the time frame specified in the order for relinquishing firearms, other weapons and ammunition, report to the sheriff's office in the county where the order was entered along with the third party.

(2) Upon determination by the sheriff that the third party is not prohibited from possessing firearms, other weapons or ammunition pursuant to any Federal or State law and after the defendant and third party have executed the affidavits required under paragraph (3), the sheriff shall issue a safekeeping permit to the third party, which shall include, at a minimum, a list of the firearms, other weapons and ammunition which will be relinquished to the third party. The permit shall be issued at no cost to the third party or defendant. The permit shall require the third party to possess the defendant's firearms, other weapons and ammunition until the time that:

(i) the sheriff revokes the safekeeping permit pursuant to subsection (c)(1); or

(ii) the sheriff accepts return of the safekeeping permit pursuant to subsection (d).

(3)(i) A defendant wishing to relinquish firearms, other weapons or ammunition to a third party pursuant to subsection (a) shall, in the presence of the sheriff or the sheriff's designee, execute an affidavit on a form prescribed by the Pennsylvania State Police which shall include, at a minimum, the following:

(A) The caption of the case in which the protection from abuse order was issued.

(B) The name, address, date of birth and the Social Security number of the defendant.

(C) The name, address and date of birth of the third party.

(D) A list of the firearms, other weapons and ammunition which will be relinquished to the third party, including, if applicable, the manufacturer, model and serial number.

(E) An acknowledgment that the defendant will not take possession of any firearm, other weapon or ammunition relinquished to the third party until the sheriff accepts return of the safekeeping permit pursuant to subsection (d).

(F) A plain-language summary of 18 Pa.C.S. § 6105(a.1)(2) and (c)(6) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).

(G) A plain-language summary of 18 U.S.C. § 922(g)(8) (relating to unlawful acts).

(ii) A third party who will be accepting possession of firearms, other weapons and ammunition pursuant to subsection (a) shall, in the presence of the sheriff or the sheriff's designee, execute an affidavit on a form prescribed by the Pennsylvania State Police which shall include, at a minimum, the following:

(A) The caption of the case in which the protection from abuse order was issued.

(B) The name, address and date of birth of the defendant.

(C) The name, address, date of birth and the Social Security number of the third party.

(D) A list of the firearms, other weapons and ammunition which will be relinquished to the third party, including, if applicable, the manufacturer, model and serial number.

(E) An acknowledgment that no firearm, other weapon or ammunition relinquished to the third party will be returned to the defendant until the sheriff accepts return of the safekeeping permit pursuant to subsection (d).

(F) A plain-language summary of 18 Pa.C.S. § 6105(a.1)(5) and (c)(6), 6111(c) (relating to sale or transfer of firearms) and 6115 (relating to loans on, or lending or giving firearms prohibited).

(G) A plain-language summary of this section.

(H) An acknowledgment that the third party is not prohibited from possessing firearms, other weapons or ammunition pursuant to any Federal or State law.

(I) An acknowledgment that the third party is not subject to an active protection from abuse order.

(J) An acknowledgment that the defendant has never been the subject of a protection from abuse order issued on behalf of the third party.

(K) An acknowledgment that any firearms, other weapons and ammunition relinquished to the third party will be stored using a locking device as defined in paragraph (1) of the definition of "locking device" in 18 Pa.C.S. § 6142(f) (relating to locking device for firearms) or in a secure location to which the defendant does not have access.

(L) A detailed description of the third party liability pursuant to this section relating to civil liability.

(M) An acknowledgment that the third party shall inform the sheriff of any change of address for the third party within seven days of the change of address.

(4) The defendant shall, within the time frame specified in the order and in lieu of relinquishment to the sheriff, relinquish the firearms, other weapons and ammunition specified in the affidavits provided to the sheriff pursuant to paragraph (3) to the third party who has been issued a safekeeping permit pursuant to paragraph (2). Upon relinquishment of the firearms to the third party, the third party shall sign an acknowledgment of receipt on a form prescribed by the Pennsylvania State Police, which shall include, at a minimum, an acknowledgment that the firearms were relinquished to the third party within the time frame specified in the order.

(5) Within 24 hours of the issuance of the safekeeping permit issued to the third party pursuant to paragraph (2) or by close of the next business day as necessary due to the closure of the sheriff's office, the defendant shall return the signed acknowledgment of receipt required under paragraph (4) to the sheriff in the county where the order was entered.

(6) If the defendant fails to provide the acknowledgment of receipt to the sheriff as required under paragraph (5), an affidavit prepared in accordance with section 6108(a)(7)(i)(B) (relating to relief), an affidavit under section 6108.2 (relating to relinquishment for consignment sale, lawful transfer or safekeeping) or fails to relinquish any firearms, other weapons or ammunition, the sheriff shall, at a minimum, provide immediate notice to the court, the plaintiff and appropriate law enforcement agencies.

(c) REVOCATION OF SAFEKEEPING PERMIT.--

(1) The sheriff shall revoke a third party's safekeeping permit and require the third party to relinquish to the sheriff any firearms, other weapons or ammunition which were relinquished to the third party by a defendant pursuant to subsection (a) upon determining or being notified that any of the following apply:

(i) A protection from abuse order has been entered against the third party.

(ii) The third party is prohibited from possessing firearms, other weapons or ammunition pursuant to any Federal or State law.

(iii) The defendant has been convicted of a violation of 18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles) or any other offense involving the use of a firearm.

(iv) The defendant has been held in indirect criminal contempt for violating a provision of the protection from abuse order consistent with section 6108(a)(1), (2), (6), (7) or (9) (relating to relief).

(2) Upon revocation of a safekeeping permit, the sheriff shall seize the safekeeping permit and all of the defendant's firearms, other weapons and ammunition which were relinquished to the third party. If revocation of the safekeeping permit was:

(i) Required pursuant to paragraph (1)(i) or (ii), the sheriff shall notify the defendant that the firearms, other weapons and ammunition which were relinquished to the third party are in the sheriff's possession and that the defendant may report to the sheriff's office in order to relinquish the firearms, other weapons and ammunition to a subsequent third party pursuant to this section or to a licensed dealer pursuant to section 6108.2.

(ii) Required pursuant to paragraph (1)(iii) or (iv), the sheriff shall maintain possession of the firearms, other weapons and ammunition until the defendant is no longer prohibited from possessing firearms, other weapons and ammunition pursuant to any Federal or State law unless:



(A) the defendant has the firearms, other weapons and ammunition relinquished to a licensed dealer pursuant to section 6108.2; or (B) the sheriff is directed to relinquish the firearms, other weapons and ammunition pursuant to a court order.

(d) RETURN OF SAFEKEEPING PERMIT.--

(1) Following expiration of a protection from abuse order, which order provided for the relinquishment of firearms, other weapons or ammunition, the defendant and the third party shall report to the sheriff's office to return the safekeeping permit. Upon a determination by the sheriff that the defendant is:

(i) Not prohibited from possessing firearms, other weapons and ammunition, the sheriff shall accept the return of the safekeeping permit, and the third party shall relinquish to the defendant all of the defendant's firearms, other weapons and ammunition which were relinquished to the third party pursuant to this section.

(ii) Prohibited from possessing a firearm, other weapon or ammunition pursuant to any Federal or State law, the sheriff shall accept return of the permit and seize from the third party all of the defendant's firearms, other weapons and ammunition which were relinquished to the third party pursuant to this section. The sheriff shall return to the defendant any firearm, other weapon or ammunition which the defendant is lawfully entitled to possess.

(2) Upon issuance of a court order pursuant to 18 Pa.C.S. § 6105(f)(2) or section 6108.1(b) (relating to return of relinquished firearms, other weapons and ammunition and additional relief) which modifies a valid protection from abuse order by allowing the defendant to take possession of a firearm, other weapon or ammunition that had previously been ordered relinquished, the defendant and the third party shall report to the sheriff's office to return the safekeeping permit. The sheriff shall proceed as directed by the court order.

(3) If a third party wishes to relinquish the defendant's firearms, other weapons and ammunition prior to return of the safekeeping permit pursuant to paragraph (1), the sheriff shall accept return of the safekeeping permit and shall seize all of the defendant's firearms, other weapons and ammunition from the third party. The sheriff shall notify the defendant that the firearms, other weapons and ammunition which were relinquished to the third party are in the sheriff's possession and that the defendant may relinquish the firearms, other weapons and ammunition to a subsequent third party pursuant to this section or to a licensed dealer pursuant to section 6108.2.

(e) CIVIL LIABILITY.-- A third party who intentionally or knowingly violates any of the provisions of this section shall, in addition to any other penalty prescribed in this chapter or 18 Pa.C.S. Ch. 61, be civilly liable to any person for any damages caused thereby and, in addition, shall be liable to any person for punitive damages in an amount

not to exceed \$ 5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of the costs.

(f) FORMS.-- The Pennsylvania State Police shall develop and make available:

(1) Forms to be used by sheriffs to issue safekeeping permits pursuant to subsection (b)(2).

(2) Affidavit forms and receipt forms to be used by defendants and third parties as required under subsection (b)(3) and (4).

(g) TRANSFER UPON FINAL ENTRY.-- A defendant who has previously relinquished firearms, other weapons or ammunition to the sheriff pursuant to a temporary order shall be permitted to have the firearms, other weapons and ammunition relinquished to a third party pursuant to this section following entry of a final protection from abuse order, which order provides for the relinquishment of firearms, other weapons or ammunition during the period of time the order is in effect.

(h) NONDISCLOSURE.-- All copies of the safekeeping permit issued under subsection (b)(2) retained by the sheriff and the affidavits and forms obtained under subsection (b)(3) and (4) shall not be subject to access under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

(i) DEFINITIONS.-- As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Safekeeping." The secure custody of firearms, other weapons or ammunition which were ordered relinquished by an active protection from abuse order.

"Third party." A person, other than the defendant, who:

(1) Is not a member of the defendant's household.

(2) Is not prohibited from possessing firearms pursuant to any Federal or State law.

#### § 6108.4. Registry or database of firearm ownership

(a) CONFIDENTIALITY.-- Information retained to ensure compliance with this chapter and to document the return of firearms shall not be subject to access under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

(b) CONSTRUCTION.-- Nothing in this chapter shall be construed to allow a government agency or law enforcement agency, or an agent or employee of either, or any other

person or entity to create, maintain or operate a database or registry of firearm ownership within this Commonwealth. However, information may be retained to ensure compliance with this chapter and to document the return of firearms.

§ 6108.5. Penalties for release of information

Any person who violates section 6108(a)(7)(v) (relating to relief) by releasing information with the intent and purpose of committing such violation commits a misdemeanor of the third degree.

§ 6109. Service of orders

(a) ISSUANCE.-- A copy of an order under this chapter shall be issued to the plaintiff, the defendant and the police department with appropriate jurisdiction to enforce the order or agreement in accordance with the provisions of this chapter or as ordered by the court or hearing officer.

(b) PLACEMENT IN REGISTRY.-- Upon receipt of an order, the police department shall immediately place the order in a county registry of protection orders. The police department shall assure that the registry is current at all times and that orders are removed upon expiration thereof. County registries shall not be required when the Pennsylvania State Police registry provided for in section 6105(e) (relating to responsibilities of law enforcement agencies) is established and is fully operational.

§ 6110. Emergency relief by minor judiciary

(a) GENERAL RULE.-- When:

(1) in counties with less than four judges, the court is unavailable:

(i) from the close of business at the end of each day to the resumption of business the next morning;

(ii) from the end of the business week to the beginning of the business week; and

(iii) during the business day by reason of duties outside the county, illness or vacation;

(2) in counties with at least four judges, the court is unavailable:

(i) from the close of business at the end of each day to the resumption of business the next morning; and

(ii) from the end of the business week to the beginning of the business week;

a petition may be filed before a hearing officer who may grant relief in accordance with section 6108(a)(1), (2) and (6) or (1) and (6) (relating to relief) if the hearing officer deems it necessary to protect the plaintiff or minor children from abuse upon good cause shown in an ex parte proceeding. Immediate and present danger of abuse to the plaintiff or minor children shall constitute good cause for the purposes of this subsection.

(b) EXPIRATION OF ORDER.-- An order issued under subsection (a) shall expire at the end of the next business day the court deems itself available. The court shall schedule hearings on protection orders entered by hearing officers under subsection (a) and shall review and continue in effect protection orders that are necessary to protect the plaintiff or minor children from abuse until the hearing, at which time the plaintiff may seek a temporary order from the court.

(c) CERTIFICATION OF ORDER TO COURT.-- An emergency order issued under this section and any documentation in support thereof shall be immediately certified to the court. The certification to the court shall have the effect of commencing proceedings under section 6106 (relating to commencement of proceedings) and invoking the other provisions of this chapter. If it is not already alleged in a petition for an emergency order, the plaintiff shall file a verified statement setting forth the abuse of defendant at least five days prior to the hearing. Service of the verified statement shall be made subject to section 6106.

(d) INSTRUCTIONS REGARDING THE COMMENCEMENT OF PROCEEDINGS.-  
- Upon issuance of an emergency order, the hearing officer shall provide the plaintiff instructions regarding the commencement of proceedings in the court of common pleas at the beginning of the next business day and regarding the procedures for initiating a contempt charge should the defendant violate the emergency order. The hearing officer shall also advise the plaintiff of the existence of programs for victims of domestic violence in the county or in nearby counties and inform the plaintiff of the availability of legal assistance without cost if the plaintiff is unable to pay for them.

(e) MASTER FOR EMERGENCY RELIEF.-- The president judge of a court of common pleas of a judicial district may, with the approval of the Administrative Office of Pennsylvania Courts, provide for the selection and appointment of a master for emergency relief on a full-time or part-time basis. The number of masters for emergency relief shall be fixed by the president judge with the approval of the Administrative Office of Pennsylvania Courts. The compensation of a master for emergency relief shall be fixed and paid by the county.

§ 6111. Domestic violence counselor/advocate

A domestic violence counselor/advocate may accompany a party to any legal proceeding or hearing under this chapter.

§ 6112. Disclosure of addresses

During the course of a proceeding under this chapter, the court or hearing officer may consider whether the plaintiff or plaintiff's family is endangered by disclosure of the permanent or temporary address of the plaintiff or minor children. Neither in the pleadings nor during proceedings or hearings under this chapter shall the court or hearing officer require disclosure of the address of a domestic violence program. Where the court concludes that the defendant poses a threat of continued danger to the plaintiff and where the plaintiff requests that his or her address, telephone number and information about whereabouts not be disclosed, the court shall enter an order directing that law enforcement agencies, human service agencies and school districts (both in which a plaintiff's child in custody of the plaintiff is or has been enrolled) shall not disclose the presence of the plaintiff or the child in the jurisdiction or district or furnish any address, telephone number or any other demographic information about the plaintiff and child except by further order of the court.

§ 6113. Arrest for violation of order

(a) GENERAL RULE.-- An arrest for violation of an order issued pursuant to this chapter or a foreign protection order may be without warrant upon probable cause whether or not the violation is committed in the presence of the police officer or sheriff in circumstances where the defendant has violated a provision of an order consistent with section 6108(a)(1), (2), (3), (4), (6), (7) or (9) (relating to relief). The police officer or sheriff may verify the existence of a protection order by telephone, radio or other electronic communication with the appropriate police department, Pennsylvania State Police registry, protection order file or issuing authority. A police officer or sheriff shall arrest a defendant for violating an order issued under this chapter by a court within the judicial district, issued by a court in another judicial district within this Commonwealth or a foreign protection order issued by a comparable court.

(b) SEIZURE OF FIREARMS, OTHER WEAPONS AND AMMUNITION.-- Subsequent to an arrest, the police officer or sheriff shall seize all firearms, other weapons and ammunition used or threatened to be used during the violation of the protection order or during prior incidents of abuse and any other firearms in the defendant's possession. As soon as it is reasonably possible, the arresting officer shall deliver the confiscated firearms, other weapons and ammunition to the office of the sheriff. The sheriff shall maintain possession of the firearms, other weapons and ammunition until the court issues an

order specifying the firearms, other weapons and ammunition to be relinquished and the persons to whom the firearms, other weapons and ammunition shall be relinquished.

(c) PROCEDURE FOLLOWING ARREST.-- Subsequent to an arrest, the defendant shall be taken by the police officer or sheriff without unnecessary delay before the court in the judicial district where the contempt is alleged to have occurred. When that court is unavailable, the police officer or sheriff shall convey the defendant to a magisterial district judge designated as appropriate by local rules of court or, in the city of Pittsburgh, to a magistrate of the Pittsburgh Magistrates Court or, in counties of the first class, to the appropriate hearing officer. For purposes of procedure relating to arraignments for arrest for violation of an order issued under this chapter, the judges of Pittsburgh Magistrates Court shall be deemed to be magisterial district judges.

(d) PRELIMINARY ARRAIGNMENT.-- The defendant shall be afforded a preliminary arraignment without unnecessary delay.

(e) OTHER EMERGENCY POWERS UNAFFECTED.-- This section shall not be construed to in any way limit any of the other powers for emergency relief provided in this chapter.

(f) HEARING.-- A hearing shall be scheduled within ten days of the filing of the charge or complaint of indirect criminal contempt. The hearing and any adjudication shall not preclude a hearing on other criminal charges underlying the contempt, nor shall a hearing or adjudication on other criminal charges preclude a hearing on a charge of indirect criminal contempt.

#### § 6113.1. Private criminal complaints for violation of order or agreement

(a) GENERAL RULE.-- A plaintiff may file a private criminal complaint against a defendant, alleging indirect criminal contempt for a noneconomic violation of any provision of an order or court-approved consent agreement issued under this chapter or a foreign protection order, with the court, the office of the district attorney or the magisterial district judge in the jurisdiction or county where the violation occurred, except that, in a city of the first class, a complaint may only be filed with the family division of the court of common pleas or the office of the district attorney.

(b) PROCEDURE SERVICE.-- Procedure for filing and service of a private criminal complaint shall be provided as set forth by local rule. No fees or costs associated with the prosecution of the private criminal complaint shall be assigned to the plaintiff at any stage of the proceeding, including, but not limited to, filing, service, failure to prosecute, withdrawal or dismissal. Nothing in this subsection is intended to expand or diminish the court's authority to enter an order pursuant to Pa.R.C.P. No. 1023.1 (relating to Scope. Signing of Documents. Representations to the Court. Violation).

(c) FEES AND COSTS.-- After a finding of indirect criminal contempt, fees and costs may be assessed against the defendant. The court shall waive fees and costs imposed pursuant to this chapter upon a showing of good cause or when the court makes a finding that the defendant is not able to pay the costs associated with the indirect criminal contempt action. Nothing in this subsection is intended to expand or diminish the court's authority to enter an order pursuant to Pa.R.C.P. No. 1023.1.

#### § 6114. Contempt for violation of order or agreement

(a) GENERAL RULE.-- Where the police, sheriff or the plaintiff have filed charges of indirect criminal contempt against a defendant for violation of a protection order issued under this chapter, a foreign protection order or a court-approved consent agreement, the court may hold the defendant in indirect criminal contempt and punish the defendant in accordance with law.

(A.1) JURISDICTION.-- A court shall have jurisdiction over indirect criminal contempt charges for violation of a protection order issued pursuant to this chapter in the county where the violation occurred and in the county where the protection order was granted. A court shall have jurisdiction over indirect criminal contempt charges for violation of a foreign protection order in the county where the violation occurred.

(A.2) MINOR DEFENDANT.-- Any defendant who is a minor and who is charged with indirect criminal contempt for allegedly violating a protection from abuse order shall be considered to have committed an alleged delinquent act as that term is defined in 42 Pa.C.S. § 6302 (relating to definitions) and shall be treated as provided in 42 Pa.C.S. Ch. 63 (relating to juvenile matters).

(b) TRIAL AND PUNISHMENT.--

(1) A sentence for contempt under this chapter may include:

(i)(A) a fine of not less than \$ 300 nor more than \$ 1,000 and imprisonment up to six months; or

(B) a fine of not less than \$ 300 nor more than \$ 1,000 and supervised probation not to exceed six months; and

(ii) an order for other relief set forth in this chapter.

(2) All money received under this section shall be distributed in the following order of priority:

(i) \$ 100 shall be forwarded to the Commonwealth and shall be appropriated to the Pennsylvania State Police to establish and maintain the Statewide registry of protection orders provided for in section 6105 (relating to responsibilities of law enforcement agencies).

(ii) \$ 100 shall be retained by the county and shall be used to carry out the provisions of this chapter as follows:

(A) \$ 50 shall be used by the sheriff.

(B) \$ 50 shall be used by the court.

(iii) \$ 100 shall be forwarded to the Department of Public Welfare for use for victims of domestic violence in accordance with the provisions of section 2333 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.

(iv) Any additional money shall be forwarded to the Commonwealth and shall be used by the Pennsylvania State Police to establish and maintain the Statewide registry of protection orders provided for in section 6105.

(3) The defendant shall not have a right to a jury trial on a charge of indirect criminal contempt. However, the defendant shall be entitled to counsel.

(4) Upon conviction for indirect criminal contempt and at the request of the plaintiff, the court shall also grant an extension of the protection order for an additional term.

(5) Upon conviction for indirect criminal contempt, the court shall notify the sheriff of the jurisdiction which issued the protection order of the conviction.

(6) The minimum fine required by subsection (b)(1) allocated pursuant to subsection (b)(2)(i) and (iii) shall be used to supplement and not to supplant any other source of funds received for the purpose of carrying out the provisions of this chapter.

(c) NOTIFICATION UPON RELEASE.-- The appropriate releasing authority or other official as designated by local rule shall use all reasonable means to notify the victim sufficiently in advance of the release of the offender from any incarceration imposed under subsection (b). Notification shall be required for work release, furlough, medical leave, community service, discharge, escape and recapture. Notification shall include the terms and conditions imposed on any temporary release from custody. The plaintiff must keep the appropriate releasing authority or other official as designated by local rule advised of contact information; failure to do so will constitute waiver of any right to notification under this section.



(d) MULTIPLE REMEDIES.-- Disposition of a charge of indirect criminal contempt shall not preclude the prosecution of other criminal charges associated with the incident giving rise to the contempt, nor shall disposition of other criminal charges preclude prosecution of indirect criminal contempt associated with the criminal conduct giving rise to the charges.

§ 6114.1. Civil contempt or modification for violation of an order or agreement

(a) GENERAL RULE.-- A plaintiff may file a petition for civil contempt with the issuing court alleging that the defendant has violated any provision of an order or court-approved agreement issued under this chapter or a foreign protection order.

(b) CIVIL CONTEMPT ORDER.-- Upon finding of a violation of a protection order or court-approved consent agreement issued under this chapter or a foreign protection order, the court, either pursuant to petition for civil contempt or on its own accord, may hold the defendant in civil contempt and constrain him in accordance with law.

(c) SENTENCING.-- A sentence for civil contempt under this chapter may include imprisonment until the defendant complies with provisions in the order or consent agreement or demonstrates the intent to do so, but in no case shall a term of imprisonment under this section exceed a period of six months.

(d) JURY TRIAL AND COUNSEL.-- The defendant shall not have a right to a jury trial; however, the defendant shall be entitled to counsel.

§ 6115. Reporting abuse and immunity

(a) REPORTING.-- A person having reasonable cause to believe that a person is being abused may report the information to the local police department.

(b) CONTENTS OF REPORT.-- The report should contain the name and address of the abused person, information regarding the nature and extent of the abuse and information which the reporter believes may be helpful to prevent further abuse.

(c) IMMUNITY.-- A person who makes a report shall be immune from a civil or criminal liability on account of the report unless the person acted in bad faith or with malicious purpose.

§ 6116. Confidentiality

Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a coparticipant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim. The privilege shall terminate upon the death of the victim. Neither the domestic violence counselor/advocate nor the victim shall waive the privilege of confidential communications by reporting facts of physical or sexual assault under Chapter 63 (relating to child protective services), a Federal or State mandatory reporting statute or a local mandatory reporting ordinance.

§ 6117. Procedure and other remedies

(a) GENERAL RULE.-- Unless otherwise indicated in this chapter, a proceeding under this chapter shall be in accordance with applicable general rules and shall be in addition to any other available civil or criminal remedies. The plaintiff and the defendant may seek modification of an order issued under section 6108 (relating to relief) at any time during the pendency of an order. Except as otherwise indicated in this chapter, modification may be ordered after the filing of a petition for modification, service of the petition and a hearing on the petition.

(b) REMEDIES FOR BAD FAITH.-- Notwithstanding any other provision of law, upon finding that an individual commenced a proceeding under this chapter in bad faith, a court shall direct the individual to pay to the defendant actual damages and reasonable attorney fees. Failure to prove an allegation of abuse by a preponderance of the evidence shall not, by itself, result in a finding of bad faith.

§ 6118. Repealed. 2001, June 22, P.L. 576, No. 39, § 6, effective in 60 days

§ 6119. Immunity

(a) GENERAL RULE.-- Law enforcement agencies and their employees, including police officers and sheriffs, shall, except as provided in subsection (b), be immune from civil liability for actions taken in good faith to carry out their duties relating to the seizure and relinquishment of firearms, other weapons and ammunition as provided for in this chapter, except for gross negligence, intentional misconduct or reckless, willful or wanton misconduct.

(b) EXCEPTION.-- Law enforcement agencies and their employees, including police officers and sheriffs, shall be liable to the lawful owner of confiscated, seized or relin-

quished firearms in accordance with 18 Pa.C.S. § 6105(f) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms) and shall be liable to the lawful owner of confiscated, seized or relinquished other weapons or ammunition for any loss, damage or substantial decrease in the value of the other weapons or ammunition that is a direct result of a lack of reasonable care by the law enforcement agency or its employees.

§ 6120. Inability to pay

(a) ORDER FOR INSTALLMENT PAYMENTS.-- Upon plea and proof that a person is without the financial means to pay a fine, a fee, economic relief ordered under section 6108(a)(8) (relating to relief) or a cost, a court may order payment of money owed in installments appropriate to the circumstances of the person and shall fix the amounts, times and manner of payment.

(b) USE OF CREDIT CARDS.-- The treasurer of each county may allow the use of credit cards and bank cards in the payment of money owed under this chapter.

§ 6121. Warrantless searches

Except as provided in section 6113 (relating to arrest for violation of order), nothing in this chapter shall authorize a warrantless search for firearms, other weapons or ammunition.

§ 6122. Construction

Nothing in this chapter shall be construed to preclude an action for wrongful use of civil process pursuant to 42 Pa.C.S. Ch. 83 Subch. E (relating to wrongful use of civil proceedings) or criminal prosecution for a violation of 18 Pa.C.S. Ch. 49 (relating to falsification and intimidation).

## **Appendix F-2: PA Protection From Abuse Rules**

## CHAPTER 1900. ACTIONS PURSUANT TO THE PROTECTION FROM ABUSE ACT

### Rule

- 1901. Definitions.
- 1901.1. Venue.
- 1901.2. Scheduling.
- 1901.3. Commencement of action.
- 1901.4. Service and Registration of order.
- 1901.5. Enforcement.
- 1901.6. No responsive pleading required.
- 1901.7. Decision. Post-trial relief.
- 1905. Forms for Use in PFA Actions. Notice and Hearing. Petition. Temporary Protection Order. Final Protection Order.

### **Rule 1901. Definitions.**

As used in this chapter:

- Act*—The Protection from Abuse Act No. 206 approved December 19, 1990, 23 Pa.C.S.A. § 6101 et seq.
- Action*—A proceeding for protection from abuses defined in § 6102 of the Act.
- Court*—The court of common pleas.
- Emergency Order*—An order entered by a hearing officer, who is a person meeting the definition set forth at 23 Pa.C.S.A. § 6102.
- Fees*—means any costs associated with the filing, issuance, registration, service or appeal of a Protection From Abuse matter, including any foreign protection order.
- Master for Emergency Relief*—means an attorney, admitted to the practice of law by the Supreme Court of Pennsylvania and appointed pursuant to 23 Pa.C.S.A. § 6110(e), to hear petitions for emergency protection from abuse.
- Temporary Order*—An ex parte order entered by the court pursuant to 23 Pa.C.S.A. § 6107.

### **Explanatory Comment—2006**

The 2005 amendments to the Protection From Abuse Act, Act 66 of 2005, authorize two methods to secure emergency protection from abuse orders. The first is through a magisterial district judge and the other is through a master for emergency relief. In order for a county to exercise the master for emergency relief option, the county must assume the costs of the master and the Administrative Office of Pennsylvania Courts must approve the master's selection and appointment. 23 Pa.C.S.A. § 6110 (e).

The 2005 amendments to the Protection From Abuse Act also prohibit the assessment of fees or costs against the plaintiff or petitioner. This prohibition includes fees related to filing, serving, registering or appealing a protection from abuse petition or order. 23 Pa.C.S.A. § 6104 (d)(1), 6106(b) and (g.1) and 6113.1(b).

### **Source**

The provisions of this Rule 1901 adopted March 9, 1977, effective April 10, 1977, 7 Pa.B. 839; amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943; amended March 9, 1998,

effective July 1, 1998, 28 Pa.B. 1391; amended May 2, 2006, effective May 9, 2006, 36 Pa.B. 2369. Immediately preceding text appears at serial page (242777).

**Rule 1901.1. Venue.**

(a) Except as provided in subdivision (b), an action for protection from abuse may be brought in a county in which

- (1) the plaintiff resides, either temporarily or permanently, or is employed, or
- (2) the defendant may be served, or
- (3) the abuse occurred.

(b) If the relief sought includes possession of the residence or household to the exclusion of the defendant, the action shall be brought only in the county in which the residence or household is located.

(c) An action for indirect criminal contempt may be filed in, and heard by, the court in the county in which the order was issued or where the violation occurred.

**Explanatory Comment—1991**

The statute and rules governing actions for protection from abuse formerly contained no provision for venue. Recommendation No. 84 of the Civil Procedural Rules Committee proposed a new rule to fill that void and the rule has been adopted as Rule 1901.1.

Subdivision (a) provides for venue in the following counties: (1) the county in which the abuse occurred, (2) the county in which the defendant may be served, (3) the county in which the plaintiff resides, either permanently or temporarily, and (4) the county in which the plaintiff is employed. These are the counties with which the plaintiff has the most significant contacts and the greatest interest in remaining free from abuse. The county of temporary residence is included because an abused person may have to flee the county of permanent residence to escape further abuse.

The rule imposes limited venue when the relief sought includes the sole possession of the residence or household. In that instance, the action must be brought in the county in which the residence or household is located.

**Explanatory Comment—2006**

The 2005 amendments to the Protection From Abuse Act grant jurisdiction over indirect criminal contempt complaints in either the county in which the order was issued or the county where the violation occurred. This rule allows for flexible and immediate enforcement of protection from abuse orders. With this amendment, indirect criminal contempt jurisdiction is parallel to prosecution for stalking and harassment. 23 Pa.C.S.A. § 6114 (a.1).

**Source**

The provisions of this Rule 1901.1 adopted January 25, 1991, effective July 1, 1991, 21 Pa.B. 614; amended May 2, 2006, effective May 9, 2006, 36 Pa.B. 2369. Immediately preceding text appears at serial page (242777).

**Rule 1901.2. Scheduling.**

Each judicial district shall establish times when the court will hear temporary Protection From Abuse matters.

#### **Source**

The provisions of this Rule 1901.2 adopted March 9, 1998, effective July 1, 1998, 28 Pa.B. 1391.

#### **Rule 1901.3. Commencement of Action.**

(a) Except as provided in subdivision (b), an action shall be commenced by presenting to the court or filing with the prothonotary a petition setting forth the alleged abuse by the defendant. The petition shall be substantially in the form set forth in Rule 1905(b) and shall have as its first page the Notice of Hearing and Order set forth in Rule 1905(a).

(b) An action may be commenced by filing with the prothonotary a certified copy of an emergency order entered pursuant to 23 Pa.C.S.A. § 6110, including orders issued by masters for emergency relief.

(c) Any fees associated with this action shall not be charged to the plaintiff.

(d) The master for emergency relief shall follow the procedures set forth in the Pennsylvania Rules of Civil Procedure Governing Actions and proceedings before magisterial district judges for emergency relief under the Protection From Abuse Act.

#### **Explanatory Comment—2006**

New subdivision (c) reflects the 2005 amendments to the Protection From Abuse Act which prohibits charging fees or costs against the plaintiff. 23 Pa.C.S.A. § 6106(b). The 2005 amendments to 23 Pa.C.S.A. § 6110(e) of the Protection From Abuse Act authorize the use of masters for emergency relief which is reflected in new subdivision (d).

#### **Source**

The provisions of this Rule 1901.3 adopted March 9, 1977, effective April 10, 1977, 7 Pa.B. 839; amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943; amended March 9, 1998, effective July 1, 1998, 28 Pa.B. 1391; amended May 2, 2006, effective May 9, 2006, 36 Pa.B. 2369. Immediately preceding text appears at serial page (242778).

#### **Rule 1901.4. Service and Registration of Order.**

(a) Service of the petition and temporary order shall be in accordance with Rule 1930.4.

(b) An Affidavit of Service substantially in the form set forth in Rule 1905(d) shall be filed with the prothonotary.

(c) Upon the filing of a protection order with the prothonotary, the prothonotary shall transmit a copy of the order to the State Police PFA Registry in the manner prescribed by the Pennsylvania State Police.

#### **Official Note**

This provision also applies to an order denying a plaintiff's request for a final protection order.

(d) No fee shall be charged to the plaintiff or petitioner for service of any protection from abuse order or pleading or for the registration, filing or service of any foreign protection order.

#### **Explanatory Comment—1997**

Subdivision (c) reflects the prothonotary's role in ensuring that all protection orders reach the new statewide PFA Registry. Pursuant to the 1994 amendments to the Protection From Abuse Act, the Pennsylvania State Police Department is mandated to establish this registry for all protection orders issued or registered in the Commonwealth. Once it becomes fully operational, it

will be available at all times to inform law enforcement officers, dispatchers and courts of the existence and terms of protection orders. The Registry represents a major improvement in the manner in which protection orders are registered and verified by not only eliminating the need to register the order in every county where the victim believes enforcement is necessary, but also enabling the police to immediately verify the order for purposes of enforcement. In order to ensure that the information in the Registry remains current, subdivision (c) requires the prothonotary to transmit all protection orders issued or registered in the Commonwealth, including temporary, final, modified and consent orders as well as any orders withdrawing, extending or denying the plaintiff's request for a protection order.

#### **Explanatory Comment—2006**

New subdivision (d) reflects the prohibition against charging fees to the plaintiff, even those related to foreign protection orders, as set forth in the 2005 amendments to the Protection From Abuse Act. 23 Pa.C.S.A. § 6106(b) and (g.1).

#### **Source**

The provisions of this Rule 1901.4 adopted March 9, 1977, effective April 10, 1977, 7 Pa.B. 839; amended June 20, 1985, effective January 1, 1986, 15 Pa.B. 2452; amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943; amended October 2, 1995, effective January 1, 1996, 25 Pa.B. 4518; amended March 9, 1998, effective July 1, 1998, 28 Pa.B. 1391; amended May 2, 2006, effective May 9, 2006, 36 Pa.B. 2369. Immediately preceding text appears at serial pages (242778) and (311799).

#### **Rule 1901.5. Enforcement.**

(a) When an arrest is made for violation of an order, a complaint for indirect criminal contempt shall be completed and signed by either a police officer, the sheriff or the plaintiff. When the complaint is filed by a police officer or sheriff, neither the plaintiff's presence nor signature is required.

(b) If an arrest is not effected, a complaint for indirect criminal contempt may be completed and signed by the plaintiff pursuant to 23 Pa.C.S.A. § 6113.1.

#### **Explanatory Comment—2006**

The 2005 amendments to the Protection From Abuse Act authorize the sheriff to arrest the defendant for violations of a protection from abuse order. In addition, the sheriff is authorized to exercise a search and seizure of any firearm, other weapon and ammunition subsequent to arrest. 23 Pa.C.S.A. § 6113(a) and (b).

#### **Source**

The provisions of this Rule 1901.5 adopted March 9, 1998, effective July 1, 1998, 28 Pa.B. 1391; amended May 2, 2006, effective May 9, 2006, 36 Pa.B. 2369. Immediately preceding text appears at serial page (311799).

#### **Rule 1901.6. No responsive pleading required.**

No pleading need be filed in response to the petition or the certified order and all averments not admitted shall be deemed denied.

Official Note



For procedures as to the time and manner of hearings and issuance of orders, see 23 Pa.C.S.A. § 6107. For provisions as to the scope of relief available, see 23 Pa.C.S.A. § 6108. For provisions as to contempt for violation of an order, see 23 Pa.C.S.A. § 6114.

#### **Source**

The provisions of this Rule 1901.6 adopted March 9, 1977, effective April 10, 1977, 7 Pa.B. 839; amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943; amended March 9, 1998, effective July 1, 1998, 28 Pa.B. 1391; amended May 2, 2006, effective May 9, 2006, 36 Pa.B. 2369. Immediately preceding text appears at serial page (311799).

#### **Rule 1901.7. Decision. Post-trial relief.**

(a) The decision of the court may consist of only general findings of abuse but shall dispose of all claims for relief. The court's final order shall be rendered substantially in the form set forth in Rule 1905(e).

(b) No motion for post-trial relief may be filed to the final order.

#### **Official Note**

The procedure relating to Motions for Reconsideration is set forth in Rule 1930.2.

#### **Explanatory Comment—1977**

New Rules 1901, et seq. promulgated March 9, 1977 and effective 15 days after publication in the *Pennsylvania Bulletin* implement the Protection From Abuse Act No. 218 of 1976 which became effective December 6, 1976.

The Act introduces a new civil remedy authorizing protective orders to bring about cessation of abuse of the plaintiff or minor children, which relief includes, inter alia, exclusion of the errant spouse from the household, the award of temporary custody and visitation rights with regard to minor children and support.

The Act also authorizes temporary ex parte orders when the exigency of the situation requires immediate relief before process can be served on a defendant.

Jurisdiction is also conferred on the magisterial district judges over the weekend if and when a judge of the court of common pleas is not available, but any temporary order of a magisterial district judge expires at the resumption of business of the common pleas court at the beginning of the week or within seventy-two (72) hours, whichever occurs first. The magisterial district judge is required immediately to certify his or her order to the common pleas court and the certification under the Act has the effect of commencing a proceeding in the common pleas court and invoking the other provisions of the Act.

Section 9 of the Act provides that all proceedings shall be in accordance with Rules of Civil Procedure and shall be in addition to any other available civil or criminal remedies.

#### **Explanatory Comment—2005**

Act 207-2004 amended numerous titles of the *Pennsylvania Consolidated Statutes* changing the title of "district justice" to "magisterial district judge." The amendments to Rule 1901.7's Explanatory Comment—1977 reflect the change in title, make the comment gender-neutral and delete outdated material.

#### **Source**

The provisions of this Rule 1901.7 adopted March 9, 1977, effective April 10, 1977, 7 Pa.B. 839; amended October 19, 1983, effective January 1, 1984, 13 Pa.B. 3629; amended March 30,

1994, effective July 1, 1994, 24 Pa.B. 1941; amended March 9, 1998, effective July 1, 1998, 28 Pa.B. 1391; amended May 9, 2005, effective immediately, 35 Pa.B. 2994; amended May 2, 2006, effective May 9, 2006, 36 Pa.B. 2369. Immediately preceding text appears at serial pages (311799) to (311800).

**Rule 1905. Forms for Use in PFA Actions. Notice and Hearing. Petition. Temporary Protection Order. Final Protection Order.**

(a) The Notice of Hearing and Order required by Rule 1901.3 shall be substantially in the following form:

(Caption)  
NOTICE OF HEARING AND ORDER

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following papers, you must appear at the hearing scheduled herein. If you fail to do so, the case may proceed against you and a FINAL order may be entered against you granting the relief requested in the petition. In particular, you may be evicted from your residence, be prohibited from possessing any firearm, other weapon, ammunition or any firearm license, and lose other important rights, including custody of your children. Any protection order granted by a court may be considered in subsequent proceedings under Title 23 (Domestic Relations) of the Pennsylvania Consolidated Statutes, including child custody proceedings under Chapter 53 (relating to custody).

A hearing on the matter is scheduled for the \_\_\_ day of 20 , at .m., in Courtroom \_\_\_\_ at \_\_\_\_\_ Courthouse, \_\_\_\_\_, Pennsylvania.

If an order of protection has been entered, you MUST obey the order until it is modified or terminated by the court after notice and hearing. If you disobey this order, the police or sheriff may arrest you. Violation of this order may subject you to a charge of indirect criminal contempt which is punishable by a fine of up to \$1,000 and/or up to six months in jail under 23 Pa.C.S.A. § 6114. Violation may also subject you to prosecution and criminal penalties under the Pennsylvania Crimes Code. Under federal law, 18 U.S.C. § 2265, this order is enforceable anywhere in the United States, tribal lands, U. S. Territories and the Commonwealth of Puerto Rico. If you travel outside of the state and intentionally violate this order, you may be subject to federal criminal proceedings under the Violence Against Women Act, 18 U.S.C. § § 2261—2262.

If this order directs you to relinquish any firearm, other weapon, ammunition or any firearm license to the sheriff, you may do so upon service of this order. As an alternative, you may relinquish any firearm, other weapon, or ammunition listed herein to a third party provided you and the third party first comply with all requirements to obtain a safekeeping permit. 23 Pa.C.S.A § 6108.3. You must relinquish any firearm, other weapon, ammunition or any firearm license listed in the order no later than 24 hours after service of the order. If, due to their current location, firearms, other weapons or ammunition cannot reasonably be retrieved within the time for relinquishment, you must provide an affidavit to the sheriff listing the firearms, other weapons or ammunition and their current location no later than 24 hours after service of the order. Failure to timely relinquish any firearm, other weapon, ammunition or any firearm license shall result in a

violation of this order and may result in criminal conviction under the Uniform Firearms Act, 18 Pa.C.S.A. § 6105.

NOTICE: Even if this order does not direct you to relinquish firearms, you may be subject to federal firearms prohibitions and federal criminal penalties under 18 U.S.C. § 922(g)(8).

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. YOU HAVE THE RIGHT TO HAVE A LAWYER REPRESENT YOU AT THE HEARING. THE COURT WILL NOT, HOWEVER, APPOINT A LAWYER FOR YOU. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE. IF YOU CANNOT FIND A LAWYER, YOU MAY HAVE TO PROCEED WITHOUT ONE.

County Lawyer Referral Service  
[insert Street Address]  
[insert City, State, and ZIP]  
[insert Phone Number]

(b) The petition in an action filed pursuant to the Act shall be substantially in the following form:

**(Caption)**

### **PETITION FOR PROTECTION FROM ABUSE**

1. Plaintiff's name is:

---

2. I am filing this petition on behalf of:  Myself and/or  Another Person.  
If you checked "myself," please answer all questions referring to yourself as "Plaintiff." If you checked "another person," please answer all questions referring to that person as the "Plaintiff, and provide your address here, unless confidential:

If you checked "Another Person," indicate your relationship with Plaintiff:

- parent of minor Plaintiff(s)
- applicant for appointment as guardian ad litem of minor Plaintiff(s)
- adult household member with minor Plaintiff(s)
- court appointed guardian of incompetent Plaintiff(s)

3. Name(s) of ALL person(s), including Plaintiff and minor children, who seek protection from abuse:

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4.  Plaintiff's address is confidential or  Plaintiff's address is:

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5. Defendant is believed to live at the following address:

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Defendant's Social Security Number (if known) is:

---

Defendant's date of birth is:

---

Defendant's place of employment is:

---

Check here if you have reason to believe that Defendant is a licensed firearms dealer is employed by a licensed firearms dealer or manufacturer, is employed as a writer, researcher or technician in the firearms or hunting industry or is required to carry a firearm as a condition of employment.

Check here if Defendant is 17 years old or younger.

6. Indicate the relationship between Plaintiff and Defendant.

CHECK ALL THAT APPLY:

- spouse or former spouse of Defendant
- parent of a child with Defendant
- current or former sexual or intimate partner with Defendant
- child of Plaintiff
- child of Defendant
- family member related by blood (consanguinity) to Defendant
- family member related by marriage or affinity to Defendant
- sibling (person who shares parenthood) of Defendant
- current or former cohabitant (person who lives with) Defendant

7. Have Plaintiff and Defendant been involved in any of the following court actions?

Divorce  Custody  Support  Protection From Abuse

If you checked any of the above, briefly indicate when and where the case was filed and the court number, if known:

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8. Has Defendant been involved in any criminal court action?

\_\_\_\_\_

If you answered Yes, is Defendant currently on probation?

\_\_\_\_\_

9. Plaintiff and Defendant are the parents of the following minor child/ren:

Name(s)                      Age(s)    who reside at (list address unless confidential)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. If Plaintiff and Defendant are parents of any minor child/ren together, is there an existing court order regarding their custody?

\_\_\_\_\_

If you answered "Yes," describe the terms of the order (e.g., primary, shared, legal and/or physical custody):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If you answered "Yes," in what county and state was the order issued?

\_\_\_\_\_

If you are now seeking an order of child custody as part of this petition, list the following information:

(a) Where has each child resided during the past five years?

Child's name	Person(s) child lived with	Address, unless confidential	When
--------------	----------------------------	------------------------------	------

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

(b) List any other persons who are known to have or claim a right to custody of each child listed above.

Name	Address	Basis of Claim
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11. The following other minor child/ren presently live with Plaintiff:

Name(s)	Age(s)	Plaintiff's relationship to child/ren
<hr/>	<hr/>	<hr/>
<hr/>	<hr/>	<hr/>
<hr/>	<hr/>	<hr/>
<hr/>	<hr/>	<hr/>

12. The facts of the most recent incident of abuse are as follows:

Approximate Date:

---

Approximate Time:

---

Place:

---

Describe in detail what happened, including any physical or sexual abuse, threats, injury, incidents of stalking, medical treatment sought, and/or calls to law enforcement (attach additional sheets of paper if necessary):

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13. If Defendant has committed prior acts of abuse against Plaintiff or the minor child/ren, describe these prior incidents, including any threats, injuries, or incidents of stalking, and indicate approximately when such acts of abuse occurred (attach additional sheets of paper if necessary):

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14. (a) Has Defendant used or threatened to use any firearms or other weapons against Plaintiff or the minor child/ren? If so, please describe the use or threatened use below and list on Attachment A to Petition, which is incorporated by reference into this petition, any firearms, other weapons or ammunition Defendant used or threatened to use against Plaintiff and/or the minor children:

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(b) Other than the firearms, other weapons or ammunition Defendant used or threatened to use against Petitioner or the minor child/ren, does Defendant, to the best of your knowledge or belief, own or possess any additional firearm, other weapon, ammunition or any firearm license?

(c) If the answer to (b) above is "yes," list any additional firearm, other weapon or ammunition owned by or in the possession of Defendant on Attachment A to Petition, which is incorporated by reference into this petition.

(d) Plaintiff (*check one*)  DOES  DOES NOT request that the court order Defendant to relinquish firearms, other weapons or ammunition listed on Attachment A to Petition. If Plaintiff does seek relinquishment, identify on Attachment A to Petition the firearms, other weapons and ammunition Plaintiff requests the court to order Defendant to relinquish.

15. Identify the sheriff, police department or law enforcement agency in the area in which Plaintiff lives that should be provided with a copy of the protection order:

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16. There is an immediate and present danger of further abuse from Defendant.

CHECK THE FOLLOWING BOXES ONLY IF THEY APPLY TO YOUR CASE AND PROVIDE THE REQUESTED INFORMATION

Plaintiff is asking the court to evict and exclude Defendant from the following residence:

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owned by (list owners, if known):

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rented by (list all names, if known):

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Defendant owes a duty of support to Plaintiff and/or the minor child/ren.

Plaintiff has suffered out-of-pocket financial losses as a result of the abuse described above. Those losses are:

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FOR THE REASONS SET FORTH ABOVE, I REQUEST THAT THE COURT ENTER A TEMPORARY ORDER, and AFTER HEARING, A FINAL ORDER THAT WOULD DO THE FOLLOWING (CHECK ALL FORMS OF RELIEF REQUESTED):

A. Restrain Defendant from abusing, threatening, harassing, or stalking Plaintiff and/or the minor child/ren in any place where Plaintiff and/or the child/ren may be found.

B. Evict/exclude Defendant from Plaintiff's residence and prohibit Defendant from attempting to enter any temporary or permanent residence of Plaintiff.

C. Require Defendant to provide Plaintiff and/or the minor child/ren with other suitable housing.

D. Award Plaintiff temporary custody of the minor child/ren and place the following restrictions on contact between Defendant and the child/ren:

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E. Prohibit Defendant from having any contact with Plaintiff and/or the minor child/ren, either in person, by telephone, or in writing, personally or through third persons, including but not limited to any contact at Plaintiff's school, business, or place of employment, except as the court may find necessary with respect to partial custody and/or visitation with the minor child/ren.

F. Prohibit Defendant from having any contact with Plaintiff's relatives and Plaintiff's children listed in this petition, except as the court may find necessary with respect to partial custody and/or visitation with the minor child/ren. The following persons are Plaintiff's relatives or family and household members that Plaintiff believes require protection from stalking and harassment by Defendant.

Name	Address (optional)	Relationship to Plaintiff
_____	_____	_____
_____	_____	_____
_____	_____	_____

G. Order Defendant to temporarily relinquish some or all of the firearms, other weapons and/or ammunition listed on Attachment A to Petition and any firearm license to the sheriff of this county and/or prohibit Defendant from transferring, acquiring or possessing some or all firearms for the duration of the order.

H. Order Defendant to pay temporary support for Plaintiff and/or the minor child/ren, including medical support and  payment of the rent or mortgage on the residence.

I. Direct Defendant to pay Plaintiff for the reasonable financial losses suffered as the result of the abuse, to be determined at the hearing.

J. Order Defendant to pay the costs of this action, including filing and service fees.

K. Order Defendant to pay Plaintiff's reasonable attorney's fees.



L. Order the following additional relief, not listed above:

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M. Grant such other relief as Plaintiff requests and/or the court deems appropriate.

N. Order the police, sheriff or other law enforcement agency to serve the Defendant with a copy of this petition, any order issued, and the order for hearing. Plaintiff will inform the designated authority of any addresses, other than Defendant's residence, where Defendant can be served.

VERIFICATION

I verify that I am the petitioner as designated in the present action and that the facts and statements contained in the above petition are true and correct to the best of my knowledge. I understand that any false statements are made subject to the penalties of 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities.

Signature

Date

(Caption)  
ATTACHMENT A TO PETITION  
FIREARMS, OTHER WEAPONS AND AMMUNITION INVENTORY

I, \_\_\_\_\_, Plaintiff in this Protection From Abuse Action, hereby (a) state that Defendant used or threatened to use the following firearms, other weapons and ammunition against Plaintiff and/or the minor child/ren (include addresses or locations, if known, such as "front seat of blue truck," "gun cabinet," "bedroom closet," etc.):

Firearm/Other Weapon/Ammunition Location

- 1.
- 2.
- 3.
- 4.

5.  
(b) state that Defendant, to the best of my knowledge or belief, owns or possesses the following firearms, other weapons or ammunition not set forth in (a) above (include addresses or locations, if known):

Firearm/Other Weapon/Ammunition Location

1.

2.

3.

4.

5.

(c) request that the court order Defendant to relinquish the following firearms, other weapons and ammunition (include addresses or locations, if known):

Firearm/Other Weapon/Ammunition Location

1.

2.

3.

4.

5.

All firearms, other weapons and ammunition owned or possessed by Defendant.

If more space is needed, more sheets may be attached to this document.

Name

Date

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Notice: This attachment will be withheld from public inspection in accordance with 23 Pa.C.S.A. § 6108(a)(7)(v).

(c) The Temporary Order of Court entered pursuant to the Act shall be substantially in the following form:

(Caption)  
TEMPORARY PROTECTION FROM ABUSE ORDER

Defendant's Name:

Defendant's Date of Birth:

Defendant's Social Security Number:

Names of All Protected Persons, including Plaintiff and minor child/ren:

AND NOW, this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, upon consideration of the attached Petition for Protection From Abuse, the court hereby enters the following Temporary Order:

1. Defendant shall not abuse, harass, stalk or threaten any of the above persons in any place where they might be found.

2. Defendant is evicted and excluded from the residence at [NONCONFIDENTIAL ADDRESS FROM WHICH DEFENDANT IS EXCLUDED] or any other permanent or temporary residence where Plaintiff or any other person protected under this order may live. Plaintiff is granted exclusive possession of the residence. Defendant shall have no right or privilege to enter or be present on the premises of Plaintiff or any other person protected under this order.

3. Except for such contact with the minor child/ren as may be permitted under Paragraph 5 of this order, Defendant is prohibited from having ANY CONTACT with Plaintiff, or any other person protected under this order, either directly or indirectly, at any location, including but not limited to any contact at Plaintiff's school, business, or place of employment. Defendant is specifically ordered to stay away from the following locations for the duration of this order:

4. Except for such contact with the minor child/ren as may be permitted under Paragraph 5 of this order, Defendant shall not contact Plaintiff, or any other person protected under this order, by telephone or by any other means, including through third persons.

5. CUSTODY.

There is a current custody order as to the child/ren of the parties:

\_\_\_\_\_  
(county court)

\_\_\_\_\_  
(docket number)

THIS ORDER SHALL NOT SUPERSEDE THE CURRENT CUSTODY ORDER.

THIS ORDER SUPERSEDES ANY PRIOR ORDER RELATING TO CHILD CUSTODY.

Until the final hearing, all contact between Defendant and the child/ren shall be limited to the following:

\_\_\_\_\_  
\_\_\_\_\_  
 Pending the outcome of the final hearing in this matter, Plaintiff is awarded temporary custody of the following minor child/ren:

\_\_\_\_\_  
\_\_\_\_\_  
The local law enforcement agency in the jurisdiction where the child/ren are located shall ensure that the child/ren are placed in the care and control of the Plaintiff in accordance with the terms of this order.

6. FIREARMS, OTHER WEAPONS AND AMMUNITION RESTRICTIONS.

Check all that apply:

Defendant is prohibited from possessing, transferring or acquiring any firearms for the duration of this order.

Defendant shall relinquish to the sheriff the following firearms licenses owned or possessed by Defendant:

\_\_\_\_\_  
\_\_\_\_\_  
 Defendant is directed to relinquish to the sheriff any firearm, other weapon or ammunition listed in Attachment A to Temporary Order, which is incorporated herein by references.

Defendant may relinquish any firearms, other weapons or ammunition to the sheriff. As an alternative, Defendant may relinquish firearms, other weapons and ammunition to a third party provided Defendant and the third party first comply with all the requirements to obtain a safekeeping permit. Defendant must relinquish any firearm, other weapon, ammunition or firearm license ordered to be relinquished no later than 24 hours after service of this order. If, due to their current location, firearms, other weapons, or ammunition cannot reasonably be retrieved within the time for relinquishment, Defendant shall provide to the sheriff an affidavit listing the firearms, other weapons or ammunition and their current location no later than 24 hours after service of this order. Failure to timely relinquish any firearm, other weapon, ammunition or any firearm license

shall result in a violation of this order and may result in criminal conviction under the Uniform Firearms Act, 18 Pa.C.S.A. § 6105.

7. The following additional relief is granted:

Defendant is prohibited from stalking, as defined in 18 Pa.C.S.A. § 2709.1, or harassing, as defined in 18 Pa.C.S.A. § 2709, the following family and household members of Plaintiff:

Name	Address (optional)	Relationship to Plaintiff
_____	_____	_____
_____	_____	_____

Other relief:

8. A certified copy of this order shall be provided to the sheriff or police department where Plaintiff resides and any other agency specified hereafter: [insert name of agency]

9. THIS ORDER SUPERSEDES ANY PRIOR PROTECTION FROM ABUSE ORDER OBTAINED BY THE SAME PLAINTIFF AGAINST THE SAME DEFENDANT.

10. THIS ORDER APPLIES IMMEDIATELY TO DEFENDANT AND SHALL REMAIN IN EFFECT UNTIL [insert expiration date] OR UNTIL OTHERWISE MODIFIED OR TERMINATED BY THIS COURT AFTER NOTICE AND HEARING.

#### NOTICE TO THE DEFENDANT

Defendant is hereby notified that violation of this order may result in arrest for indirect criminal contempt, which is punishable by a fine of up to \$1,000 and/or up to six months in jail. 23 Pa.C.S.A. § 6114. Consent of Plaintiff to Defendant's return to the residence shall not invalidate this order, which can only be changed or modified through the filing of appropriate court papers for that purpose. 23 Pa.C.S.A. § 6108(g). If Defendant is required to relinquish any firearms, other weapons or ammunition or any firearm license, those items must be relinquished to the sheriff within 24 hours of the service of this order. As an alternative, Defendant may relinquish any firearm, other weapon or ammunition listed herein to a third party provided Defendant and the third party first comply with all requirements to obtain a safekeeping permit. If, due to their current location, firearms, other weapons or ammunition cannot reasonably be retrieved within the time for relinquishment, Defendant shall provide an affidavit to the sheriff listing the firearms, other weapons or ammunition and their current location no later than 24 hours after service of this order. Defendant is further notified that violation of this order may subject him/her to state

charges and penalties under the Pennsylvania Crimes Code and to federal charges and penalties under the Violence Against Women Act, 18 U.S.C. § 2261—2262.

NOTICE TO SHERIFF, POLICE AND LAW ENFORCEMENT OFFICIALS

This order shall be enforced by the police department or sheriff who has jurisdiction over Plaintiff's residence OR any location where a violation of this order occurs OR where Defendant may be located. If Defendant violates Paragraphs 1 through 6 of this order, Defendant shall be arrested on the charge of indirect criminal contempt. An arrest for violation of this order may be made without warrant, based solely on probable cause, whether or not the violation is committed in the presence of a police officer or sheriff.

Subsequent to an arrest, the law enforcement officer or sheriff shall seize all firearms, other weapons and ammunition in Defendant's possession which were used or threatened to be used during the violation of the protection order or during prior incidents of abuse and any other firearms in Defendant's possession. Any firearm, other weapon, ammunition or any firearm license must be delivered to the sheriff's office of the county which issued this order, which office shall maintain possession of the firearms, other weapons and ammunition until further order of this court, unless the weapon/s are evidence of a crime, in which case, they shall remain with the law enforcement agency whose officer or sheriff made the arrest.

BY THE COURT:

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Judge

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Date

(Caption)

**ATTACHMENT A TO TEMPORARY ORDER  
FIREARMS, OTHER WEAPONS AND AMMUNITION INVENTORY**

It is hereby ordered that Defendant relinquish the following firearms, other weapons and ammunition to the sheriff:

Firearm/Other Weapon/Ammunition Location

- 1.
- 2.
- 3.

- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.

All firearms, other weapons and ammunition owned or possessed by the Defendant.

BY THE COURT:

\_\_\_\_\_  
Judge

\_\_\_\_\_  
Date

Notice: This attachment will be withheld from public inspection in accordance with 23 Pa.C.S.A. § 6108(a)(7)(v).

(d) The form of the Affidavit of Service in a Protection From Abuse matter shall be substantially in the following form:

(Caption)  
AFFIDAVIT OF SERVICE

I, \_\_\_\_\_, the undersigned, hereby state that I served a copy of the Notice of Hearing and Order, Petition and Temporary Order in the above-captioned action upon Defendant by handing the papers to \_\_\_\_\_ at the following address:

\_\_\_\_\_  
on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, at approximately \_\_\_\_\_ o'clock \_\_.m.

I verify that the statements made in this Affidavit are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities.

(Signature)  
(Title)  
(Address)  
(Date)

THIS FORM MUST BE COMPLETED AND SIGNED BY THE PERSON WHO SERVES THE DEFENDANT WITH THE NOTICE OF HEARING AND ORDER, PETITION AND TEMPORARY ORDER. IT MUST BE FILED WITH THE PROTHONOTARY OR BROUGHT TO THE COURT ON THE HEARING DATE.

(e) The Final Order of Court entered pursuant to the Act shall be substantially in the following form:

(Caption)  
FINAL ORDER OF COURT

Defendant's Name:

\_\_\_\_\_

Defendant's Date of Birth:

\_\_\_\_\_

Defendant's Social Security Number:

\_\_\_\_\_

Names and Dates of Birth of All Protected Persons, including Plaintiff and minor children:

Names	Dates of Birth
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

CHECK ALL THAT APPLY:  
Plaintiff or Protected Person(s) is/are:

- spouse or former spouse of Defendant
- parent of a child with Defendant
- current or former sexual or intimate partner with Defendant
- child of Plaintiff
- child of Defendant
- family member related by blood (consanguinity) to Defendant
- family member related by marriage or affinity to Defendant



sibling (person who shares parenthood) of Defendant

current or former cohabitant (person who lives with) Defendant

Defendant was served in accordance with Pa.R.C.P. 1930.4 and provided notice of the time, date and location of the hearing scheduled in this matter.

AND NOW, this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, the court having jurisdiction over the parties and the subject-matter, it is ORDERED, ADJUDGED AND DECREED as follows:

This order is entered (check one)  by agreement  by agreement without an admission  after a hearing and decision by the court  after a hearing at which Defendant was not present, despite proper service being made  by default. Without regard as to how the order was entered, this is a final order of court subject to full enforcement pursuant to the Protection From Abuse Act.

Note: Space is provided to allow for 1) the court's general findings of abuse; 2) inclusion of the terms under which the order was entered (e.g., that the order was entered with the consent of the parties, or that the defendant, though properly served, failed to appear for the hearing, or the reasons why the plaintiff's request for a final PFA order was denied); and/or 3) information that may be helpful to law enforcement (e.g., whether a firearm or other weapon was involved in the incident of abuse and/or whether the defendant is believed to be armed and dangerous).

Plaintiff's request for a final protection order is denied.

OR

Plaintiff's request for a final protection order is granted.

1. Defendant shall not abuse, stalk, harass, threaten or attempt to use physical force that would reasonably be expected to cause bodily injury to Plaintiff or any other protected person in any place where they might be found.

2. Defendant is completely evicted and excluded from the residence at (NONCONFIDENTIAL ADDRESS FROM WHICH DEFENDANT IS EXCLUDED) or any other residence where Plaintiff or any other person protected under this order may live. Exclusive possession of the residence is granted to Plaintiff. Defendant shall have no right or privilege to enter or be present on the premises of Plaintiff or any other person protected under this order.

On [insert date and time], Defendant may enter the residence to retrieve his/her clothing and other personal effects, provided that Defendant is in the company of a law enforcement officer or sheriff when such retrieval is made and [ insert any other conditions ]

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3. Except as provided in paragraph 5 of this order, Defendant is prohibited from having ANY CONTACT with Plaintiff, either directly or indirectly, or any other person protected under this order, at any location, including but not limited to any contact at Plaintiff's school, business, or place of employment. Defendant is specifically ordered to stay away from the following locations for the duration of this order:

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4. Except as provided in paragraph 5 of this order, Defendant shall not contact Plaintiff, either directly or indirectly, or any other person protected under this order, by telephone or by any other means, including through third persons.

5. Temporary custody of the minor children, [NAMES OF THE CHILDREN SUBJECT TO THE PROVISION OF THIS PARAGRAPH] shall be as follows:

Check all that apply:

STATE TO WHOM PRIMARY PHYSICAL CUSTODY IS AWARDED, STATE TERMS OF PARTIAL CUSTODY OR VISITATION, IF ANY.

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There is a current custody order as to the children of the parties:

\_\_\_\_\_  
(county court)

\_\_\_\_\_  
(docket number)

A custody petition is pending.

A hearing is scheduled for

\_\_\_\_\_  
(date, time and location)

THIS ORDER SHALL NOT SUPERSEDE THE CURRENT CUSTODY ORDER.

THIS ORDER SUPERSEDES ANY PRIOR ORDER RELATING TO CUSTODY.

6. FIREARMS, OTHER WEAPONS AND AMMUNITION RESTRICTIONS.

Check all that apply:

Defendant is prohibited from possessing, transferring or acquiring any firearms for the duration of this order.

Defendant shall relinquish to the sheriff the following firearm licenses owned or possessed by Defendant:

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Defendant is directed to relinquish to the sheriff any firearm, other weapon or ammunition listed in Attachment A to Final Order, which is incorporated herein by reference.

Defendant may relinquish any firearms, other weapons or ammunition to the sheriff. As an alternative, Defendant may either relinquish firearms, other weapons and ammunition to a third party provided Defendant and the third party first comply with all the requirements to obtain a safekeeping permit, or relinquish firearms, other weapons and ammunition to a licensed firearms dealer for consignment sale, lawful transfer or safekeeping pursuant to 23 Pa.C.S.A. § 6108.2(e). Defendant must relinquish any firearm, other weapon, ammunition or firearms license ordered to be relinquished no later than 24 hours after service of this order. Failure to timely relinquish any firearm, other weapon, ammunition or any firearm license ordered to be relinquished shall result in a violation of this order and may result in criminal conviction under the Uniform Firearms Act, 18 Pa.C.S.A. § 6105.

7. Any firearm delivered to the sheriff or transferred to a licensed firearm dealer, or a qualified third party who satisfies the procedural and substantive requirements to obtain a safekeeping permit issued under 23 Pa.C.S.A. § 6108.3 pursuant to this order or the temporary order shall not be returned to Defendant until further order of court or as otherwise provided by law.

8. The following additional relief is granted as authorized by § 6108 of the Act:

Defendant is prohibited from stalking, as defined in 18 Pa.C.S.A. § 2709.1, or harassing, as defined in 18 Pa.C.S.A. § 2709, the following family and household members of Plaintiff:

Name	Address (optional)	Relationship to Plaintiff
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Other relief:

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9. Defendant is directed to pay temporary support for: [INSERT THE NAMES OF THE PERSONS FOR WHOM SUPPORT IS TO BE PAID] as follows: [INSERT AMOUNT, FREQUENCY AND OTHER TERMS AND CONDITIONS OF THE SUPPORT ORDER]. This order for support shall remain in effect until a final support order is entered by this court. However, this order shall lapse automatically if Plaintiff does not file a complaint for support with the Domestic Relations Section of the court within two weeks of the date of this order. The amount of this temporary order does not necessarily reflect Defendant's correct support obligation, which shall be determined in accordance with the guidelines at the support hearing. Any adjustments in the final amount of support shall be credited, retroactive to this date, to the appropriate party.

10.  (a) The costs of this action are imposed on Defendant.

(b) Because this order followed a contested proceeding, or a hearing at which Defendant was not present, despite being served with a copy of the petition, temporary order and notice of the date, time and place of the hearing, Defendant is ordered to pay an additional \$100 surcharge to the court, which shall be distributed in the manner set forth in 23 Pa.C.S.A. § 6106(d).

(c) Upon a showing of good cause or a finding that Defendant is unable to pay, the costs of this action are waived.

11. Defendant shall pay \$ \_\_\_\_ to Plaintiff by \_\_\_\_\_ (insert date) as compensation for Plaintiff's out-of-pocket losses, which are as follows:

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An installment scheduled is ordered as follows:

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OR

Plaintiff is granted leave to present a petition, with appropriate notice to Defendant, to [INSERT THE NAME OF THE JUDGE OR COURT TO WHICH THE PETITION SHOULD BE PRESENTED] requesting recovery of out-of-pocket losses. The petition shall include an exhibit itemizing all claimed out-of-pocket losses, copies of all bills and estimates of repair, and an order scheduling a hearing. No fee shall be required by the prothonotary's office for the filing of this petition.

12. THIS ORDER SUPERCEDES ANY PRIOR PROTECTION FROM ABUSE ORDER OBTAINED BY THE SAME PLAINTIFF AGAINST THE SAME DEFENDANT.

13. All provisions of this order shall expire:  
Check one

in \_\_\_\_\_ [INSERT DAYS, MONTHS OR YEARS] on [INSERT EXPIRATION DATE]

in three years, on [INSERT EXPIRATION DATE]

#### NOTICE TO THE DEFENDANT

VIOLATION OF THIS ORDER MAY RESULT IN YOUR ARREST ON THE CHARGE OF INDIRECT CRIMINAL CONTEMPT WHICH IS PUNISHABLE BY A FINE OF UP TO \$1,000 AND/OR A JAIL SENTENCE OF UP TO SIX MONTHS. 23 PA.C.S.A. § 6114. VIOLATION MAY ALSO SUBJECT YOU TO PROSECUTION AND CRIMINAL PENALTIES UNDER THE PENNSYLVANIA CRIMES CODE. A VIOLATION OF THIS ORDER MAY RESULT IN THE REVOCATION OF THE SAFEKEEPING PERMIT, WHICH WILL REQUIRE THE IMMEDIATE RELINQUISHMENT OF YOUR FIREARMS, OTHER WEAPONS AND AMMUNITION TO THE SHERIFF. PLAINTIFF'S CONSENT TO CONTACT BY DEFENDANT SHALL NOT INVALIDATE THIS ORDER WHICH CAN ONLY BE MODIFIED BY FURTHER ORDER OF COURT. 23 PA.C.S.A § 6108(g).

THIS ORDER IS ENFORCEABLE IN ALL FIFTY (50) STATES, THE DISTRICT OF COLUMBIA, TRIBAL LANDS, U.S. TERRITORIES AND THE COMMONWEALTH OF PUERTO RICO UNDER THE VIOLENCE AGAINST WOMEN ACT, 18 U.S.C. § 2265. IF YOU TRAVEL OUTSIDE OF THE STATE AND INTENTIONALLY VIOLATE THIS ORDER, YOU MAY BE SUBJECT TO FEDERAL CRIMINAL PROCEEDINGS UNDER THAT ACT. 18 U.S.C. § § 2261—2262. IF YOU POSSESS A FIREARM OR ANY AMMUNITION WHILE THIS ORDER IS IN EFFECT, YOU MAY BE CHARGED WITH A FEDERAL OFFENSE EVEN IF THIS PENNSYLVANIA ORDER DOES NOT EXPRESSLY PROHIBIT YOU FROM POSSESSING FIREARMS OR AMMUNITION. 18 U.S.C. § 922(g)(8).

#### NOTICE TO SHERIFF, POLICE AND LAW ENFORCEMENT OFFICIALS

The police and sheriff who have jurisdiction over Plaintiff's residence OR any location where a violation of this order occurs OR where Defendant may be located, shall enforce this order. The court shall have jurisdiction over any indirect criminal contempt proceeding, either in the county where the violation occurred or where this protective order was entered. An arrest for violation of paragraphs 1 through 7 of this order may be without warrant, based solely on probable cause, whether or not the violation is committed in the presence of the police or any sheriff. 23 Pa.C.S.A. § 6113.

Subsequent to an arrest, and without the necessity of a warrant, the police officer or sheriff shall seize all firearms, other weapons and ammunition in Defendant's possession that were used or threatened to be used during the violation of the protection order or during prior incidents of abuse and any other firearms in Defendant's possession. The [insert the appropriate name or title] shall maintain possession of the firearms, other weapons or ammunition until further order of this court.

When Defendant is placed under arrest for violation of the order, Defendant shall be taken to the appropriate authority or authorities before whom Defendant is to be arraigned. A "Complaint for Indirect Criminal Contempt" shall then be completed and signed by the police officer, sheriff OR Plaintiff. Plaintiff's presence and signature are not required to file the complaint.

If sufficient grounds for violation of this order are alleged, Defendant shall be arraigned, bond set, if appropriate and both parties given notice of the date of hearing.

BY THE COURT:

\_\_\_\_\_  
Judge

\_\_\_\_\_  
Date

If entered pursuant to the consent of plaintiff and defendant:

\_\_\_\_\_  
(Plaintiff's signature)

\_\_\_\_\_  
(Defendant's signature)

(Caption)

ATTACHMENT A TO FINAL ORDER  
FIREARMS, OTHER WEAPONS AND AMMUNITION INVENTORY

It is hereby ordered that Defendant relinquish the following firearms, other weapons and ammunition to the sheriff:

Firearm/other Weapon/Ammunition	Location
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- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.

9.

10.

All firearms, other weapons and ammunition owned or possessed by Defendant.

BY THE COURT:

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Judge

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Date

Notice: This attachment will be withheld from public inspection in accordance with 23 Pa.C.S.A. § 6108(a)(7)(v).

#### **Explanatory Comment—1977**

The use of standardized forms provides uniformity and is also critical to the enforcement of protection orders both inside and outside of the commonwealth. These forms are substantially based on those proposed by members of the Pennsylvania Coalition Against Domestic Violence and have been further refined to accommodate the litigants' need for simplicity, the court's need for flexibility and law enforcements' need for certain identifying information necessary to enforce the protection order.

The forms must be used so that all protection orders can be properly registered with the statewide PFA Registry and the federal Protection Order File (POF) established by the National Crime Information Center (NCIC) for the collection of information that is necessary for nationwide enforcement of protection orders. Entering a protection order into the Registry and NCIC file enables law enforcement to immediately verify the existence and terms of the order. It is important, therefore, that all protection orders be registered with these two files. To this end, the forms capture all of the information that is required for data entry and the form orders are further structured to present that information in the order and sequence that is most helpful to the various law enforcement agencies responsible for entering the information into the files. Once the information reaches the Registry and is accepted by the NCIC file, it becomes immediately accessible to law enforcement agencies, dispatchers and courts throughout the country.

The provisions in the form petition and orders reflect the most common forms of relief available under the Protection From Abuse Act. Plenty of space, however, is provided for the plaintiff to request additional relief, and for courts to fashion appropriate relief, based on the individual circumstances of the litigants. Since all of the provisions will not necessarily apply in every case, the forms adopt a checkbox method that requires the user to affirmatively check only those provisions which are applicable to his or her situation.

In cases where a provision is generally applicable but its terms do not correspond precisely to the relief being requested or granted, the user should not check the standard provision but instead should use the blank spaces provided in the forms to specify the relief. For example, while the final order contains a standard provision permitting the defendant to retrieve personal belongings only in the company of a police officer, there may be more suitable methods of retrieval available

in some cases. If so, then the plaintiff or court should use the blank spaces provided in the form petition or order (rather than the standard provision) to specify the alternative manner of retrieval.

#### **Explanatory Comment—2000**

Paragraph 2 of the final order has been amended to enable courts to include additional conditions for the retrieval of personalty by the defendant in a section of the final order which permits arrest without a warrant if the conditions are violated. Paragraph 9 of the final order has been amended to require the filing of a support complaint within two weeks, rather than fifteen days, of the entry of a final order under the Protection From Abuse Act to prevent the automatic lapse of any temporary support provisions included in the order. This change is consistent with the statutory provisions at 23 Pa.C.S.A. § 6108(a)(5).

#### **Explanatory Comment—2006**

The Notice to Defend in subdivision (a) was amended to include three notice requirements of the 2005 Protection From Abuse Act amendments, Act 66 of 2005. 23 Pa.C.S.A. § 6107 (a). The amendments provide that sheriffs may arrest defendants for violations of protective orders. The notice also advises the defendant that if firearms, other weapons or ammunition cannot reasonably be retrieved within the required time, the defendant must provide the sheriff with an affidavit listing the firearms, other weapons and ammunition and their current location within 24 hours. Pa.C.S.A. § 6108(a)(7)(i)(B). In addition, defendants have the option to turn firearms, other weapons and ammunition over to a qualified third party instead of the sheriff, and federal firearms prohibitions and penalties are more clearly stated.

The 2005 amendments to the Protection From Abuse Act require several changes to the form petition at subdivision (b). The plaintiff is required to inform the court if the defendant works in a job that requires the handling of firearms. This provision was included to allow courts to exercise appropriate discretion when a defendant is exempt from federal firearm prohibitions and penalties. It also directs the court to “make a reasonable effort to preserve the financial assets of the defendant’s business while fulfilling the goals” of the Protection From Abuse Act. 23 Pa.C.S.A. § 6108(a)(7.1). Federal law prohibits possession of firearms and penalizes defendants who possess them if they are subject to an order prohibiting abuse, stalking or harassment. However, certain law enforcement officials are exempt from this prohibition and penalty. Under 18 U.S.C. § 925(a)(1), a person performing an official duty on behalf of the federal, state or local law enforcement agency may possess a firearm as long as the officer is required to possess the firearm in his or her official capacity. The Bureau of Alcohol, Tobacco and Firearms requires the official possession of the firearm to be authorized by statute, regulation or official department policy. The new notice requirement is found in 23 Pa.C.S.A. § 6106 (a.2).

Paragraph 14 of the form petition was amended to address the manner in which the firearms and other weapons were used against the plaintiff or minor children and to remove the listing of firearms in the petition itself. The amended statute prohibits public access to any list or inventory of the defendant’s firearms, other weapons or ammunition. Thus, a separate Attachment A is included at the end of the petition for purposes of listing the firearms, other weapons and ammunition at issue. This will allow the prothonotary to more easily redact the list from public access, while at the same time permitting the court, the parties and law enforcement agencies to enforce the order. 23 Pa.C.S.A. § 6108 (a)(7)(v). Section 6108(a)(7) of the Protection From Abuse Act provides for relinquishment of other weapons and ammunition only if they have been used or threatened to be used in an act of abuse. Paragraph 14 and Attachment A to Petition



balance the court's need to be advised of firearms, other weapons and ammunition used or threatened to be used in an act of abuse or available to the defendant with the plaintiff's right to decline to seek relinquishment of some or all of those firearms, other weapons and ammunition.

The form petition also was amended to address the court's authority to order the defendant to relinquish any and all firearms, whether they were used or threatened to be used in an act of abuse or not. Any one of several circumstances authorizes the court to grant this relief, including, but not limited to, abuse involving a firearm or weapon or an immediate and present danger of abuse. The amended statute provides the court with multiple examples of what may constitute proof of immediate and present danger for the purposes of ordering the relinquishment of any or all of the defendant's firearms. 23 Pa.C.S.A. § 6107(b)(3). Finally, the form addresses the court's authority to order the defendant to relinquish other weapons and ammunition which were used or threatened to be used in an act of abuse.

The form temporary order retains a space for the defendant's Social Security number. Pursuant to 23 Pa.C.S.A. § 6108(b), "[a]ny order issued under this section shall, where furnished by either party, specify the Social Security number and date of birth of the defendant."

In subdivisions (c) and (e), paragraph three in the form temporary and final orders is amended to clarify that even indirect contact with a protected person may be prohibited. This clarification reflects the Pennsylvania Supreme Court's holding in *Commonwealth v. Baker*, 564 Pa. 192, 766 A.2d 328 (2001), that 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 prohibited conduct."

The amendments to paragraph five of the form temporary and final orders are consistent with the statutory provisions of the Protection From Abuse Act relating to custody. See 23 Pa.C.S.A. § 6108(a)(4).

The 2005 amendments to the Protection From Abuse Act provide that the court may order the defendant to relinquish ammunition and firearm licenses, in addition to firearms and other weapons. 23 Pa.C.S.A. § 6108(a)(7) and 7.1. These items were added to paragraph six of the temporary and final order forms, the notices to the defendant and the notices to the sheriff, police and law enforcement.

The amendments to paragraph six of the form orders also provide the court with discretion to place certain restrictions on firearms possession or to completely proscribe firearms possession. The amended paragraphs and the notices to the defendant inform the parties that if the defendant is ordered to relinquish firearms, weapons or ammunition, they must be relinquished to the sheriff or, in the alternative, they may be relinquished to a third party who complies with the substantive and procedural requirements for a third party safekeeping permit. 23 Pa.C.S.A. §§ 6107(a), 6108.3. Upon entry of a final order, the defendant may also relinquish firearms, other weapons or ammunition to a licensed firearms dealer. No matter which option Defendant chooses, if firearms and weapons are ordered to be relinquished, any firearm license ordered to be relinquished must be relinquished to the sheriff. The aforementioned items may be relinquished at the time of service, but no later than 24 hours after service unless, with regard to firearms, other weapons or ammunition, they cannot reasonably be retrieved due to their location. 23 Pa.C.S.A. § 6108

(a)(7)(i). The notice to the defendant in the final order was expanded to advise the defendant that violation of the order may result in the revocation of the third-party safekeeping permit.

Paragraph seven of the final order form was amended to reflect 23 Pa.C.S.A. § 6108.1(a) and other statutory provisions concerning the return of firearms.

Paragraph ten of the final order form was amended to reflect the statute's prohibition against charging the plaintiff fees or costs related to filing, service, registration or appeal in any Protection From Abuse matter. A new subparagraph (b) in paragraph ten of the final order reflects the 2005 amendments to the Protection From Abuse Act which increased the surcharge a court may order a defendant to pay when an action is contested and directs the disbursement of the collected surcharges. 23 Pa.C.S.A. § 6106(d).

Paragraph fourteen of the final order form was amended to reflect the increased period of protection the court may grant. The maximum period of protection was increased from eighteen months to three years.

The amended notice to the sheriff, police and law enforcement in the final order clarifies that the defendant may be arrested anywhere a violation occurs, and that the court has jurisdiction to hear the issue of indirect criminal contempt either where the order was issued or where the violation occurred. With this amendment, jurisdiction for indirect criminal contempt is parallel to prosecution for stalking and harassment. 23 Pa.C.S.A. § 6114(a.1). The notice also makes it clear that a search and seizure of firearms may occur without a warrant when incident to arrest. 23 Pa.C.S.A. § 6113(b) and 6121.

Other amendments to the order forms reflect that the sheriff is authorized to arrest for violations of the order under the Protection From Abuse Act. 23 Pa.C.S.A. § 6113. The references to a protective order superseding provisions of a prior custody order were moved to paragraph five, which deals with custody, in both the temporary and final orders.

#### **Source**

The provisions of this Rule 1905 adopted March 9, 1998, effective July 1, 1998, 28 Pa.B. 1391; amended June 2, 2000, effective immediately, 30 Pa.B. 3027; amended October 27, 2000, effective immediately, 30 Pa.B. 5837; amended October 31, 2002, effective immediately, 32 Pa.B. 5632; amended March 18, 2004, effective June 16, 2004, 34 Pa.B. 1754; amended May 2, 2006, effective May 9, 2006, 36 Pa.B. 2369; amended February 6, 2007, effective May 7, 2007, 37 Pa.B. 929. Immediately preceding text appears at serial pages (319360) to (319377).

## **Appendix F-3: PA Custody Statute**

CHAPTER 53  
CHILD CUSTODY

**Sec.**

- 5321. Scope of chapter.
- 5322. Definitions.
- 5323. Award of custody.
- 5324. Standing for any form of physical custody or legal custody.
- 5325. Standing for partial physical custody and supervised physical custody.
- 5326. Effect of adoption.
- 5327. Presumption in cases concerning primary physical custody.
- 5328. Factors to consider when awarding custody.
- 5329. Consideration of criminal conviction.
- 5330. Consideration of criminal charge.
- 5331. Parenting plan.
- 5332. Informational programs.
- 5333. Counseling as part of order.
- 5334. Guardian ad litem for child.
- 5335. Counsel for child.
- 5336. Access to records and information.
- 5337. Relocation.
- 5338. Modification of existing order.
- 5339. Award of counsel fees, costs and expenses.
- 5340. Court-appointed child custody health care or behavioral health practitioners.

**Enactment.** Chapter 53 was added November 23, 2010, P.L.1106, No.112, effective in 60 days.

**Prior Provisions.** Former Chapter 53, which related to custody, was added October 30, 1985, P.L.264, No.66, and repealed November 23, 2010, P.L.1106, No.112, effective in 60 days.

**Proceedings under Former Chapter 53.** Section 4 of Act 112 of 2010 provided that a proceeding under the provisions of former Chapter 53 which was commenced before the effective date of section 4 shall be governed by the law in effect at the time the proceeding was initiated.

**Cross References.** Chapter 53 is referred to in sections 5321, 5322, 5323, 5324, 5325, 5339 of this title.

**§ 5321. Scope of chapter.**

This chapter applies to disputes relating to child custody matters.

**§ 5322. Definitions.**

**(a) This chapter.--**The following words and phrases when used in this chapter shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:

**"Abuse."** As defined in section 6102 (relating to definitions).

**"Adult."** An individual 18 years of age or older.

**"Agency."** Any organization, society, institution, court facility or other entity which provides for the care of a child. The term does not include a county children and youth social service agency.

**"Child."** An unemancipated individual under 18 years of age.

**"Legal custody."** The right to make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions.

**"Parental duties."** Includes meeting the physical, emotional and social needs of the child.

**"Partial physical custody."** The right to assume physical custody of the child for less than a majority of the time.

**"Physical custody."** The actual physical possession and control of a child.

**"Primary physical custody."** The right to assume physical custody of the child for the majority of time.

**"Relocation."** A change in a residence of the child which significantly impairs the ability of a nonrelocating party to exercise custodial rights.

**"Shared legal custody."** The right of more than one individual to legal custody of the child.

**"Shared physical custody."** The right of more than one individual to assume physical custody of the child, each having significant periods of physical custodial time with the child.

**"Sole legal custody."** The right of one individual to exclusive legal custody of the child.

**"Sole physical custody."** The right of one individual to exclusive physical custody of the child.

**"Supervised physical custody."** Custodial time during which an agency or an adult designated by the court or agreed upon by the parties monitors the interaction between the child and the individual with those rights.

**(b) Other law.--**In a statutory provision other than in this chapter, when the term "visitation" is used in reference to child custody, the term may be construed to mean:

- (1) partial physical custody;
- (2) shared physical custody; or
- (3) supervised physical custody.

### **§ 5323. Award of custody.**

**(a) Types of award.--**After considering the factors set forth in section 5328 (relating to factors to consider when awarding custody), the court may award any of the following types of custody if it is in the best interest of the child:

- (1) Shared physical custody.

- (2) Primary physical custody.
- (3) Partial physical custody.
- (4) Sole physical custody.
- (5) Supervised physical custody.
- (6) Shared legal custody.
- (7) Sole legal custody.

**(b) Interim award.**--The court may issue an interim award of custody to a party who has standing under section 5324 (relating to standing for any form of physical custody or legal custody) or 5325 (relating to standing for partial physical custody and supervised physical custody) in the manner prescribed by the Pennsylvania Rules of Civil Procedure governing special relief in custody matters.

**(c) Notice.**--Any custody order shall include notice of a party's obligations under section 5337 (relating to relocation).

**(d) Reasons for award.**--The court shall delineate the reasons for its decision on the record in open court or in a written opinion or order.

**(e) Safety conditions.**--After considering the factors under section 5328(a)(2), if the court finds that there is an ongoing risk of harm to the child or an abused party and awards any form of custody to a party who committed the abuse or who has a household member who committed the abuse, the court shall include in the custody order safety conditions designed to protect the child or the abused party.

**(f) Enforcement.**--In awarding custody, the court shall specify the terms and conditions of the award in sufficient detail to enable a party to enforce the court order through law enforcement authorities.

**(g) Contempt for noncompliance with any custody order.**--

(1) A party who willfully fails to comply with any custody order may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:

- (i) Imprisonment for a period of not more than six months.
- (ii) A fine of not more than \$500.
- (iii) Probation for a period of not more than six months.
- (iv) An order for nonrenewal, suspension or denial of operating privilege under section 4355 (relating to denial or suspension of licenses).
- (v) Counsel fees and costs.

(2) An order committing an individual to jail under this section shall specify the condition which, when fulfilled, will result in the release of that individual.

**(h) Parties in same residence.**--Parties living separate and apart in the same residence may seek relief under this chapter, but any custody order made under such a circumstance shall be effective only upon:

- (1) one party physically vacating the residence; or
- (2) an order awarding one party exclusive possession of the residence.

**Cross References.** Section 5323 is referred to in section 5336 of this title.

**§ 5324. Standing for any form of physical custody or legal custody.**

The following individuals may file an action under this chapter for any form of physical custody or legal custody:

- (1) A parent of the child.
- (2) A person who stands in loco parentis to the child.
- (3) A grandparent of the child who is not in loco parentis to the child:
  - (i) whose relationship with the child began either with the consent of a parent of the child or under a court order;
  - (ii) who assumes or is willing to assume responsibility for the child; and
  - (iii) when one of the following conditions is met:
    - (A) the child has been determined to be a dependent child under 42 Pa.C.S. Ch. 63 (relating to juvenile matters);
    - (B) the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity; or
    - (C) the child has, for a period of at least 12 consecutive months, resided with the grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, in which case the action must be filed within six months after the removal of the child from the home.

**Cross References.** Section 5324 is referred to in sections 5323, 5326 of this title.

**§ 5325. Standing for partial physical custody and supervised physical custody.**

In addition to situations set forth in section 5324 (relating to standing for any form of physical custody or legal custody), grandparents and great-grandparents may file an action under this chapter for partial physical custody or supervised physical custody in the following situations:

- (1) where the parent of the child is deceased, a parent or grandparent of the deceased parent may file an action under this section;
- (2) where the parents of the child have been separated for a period of at least six months or have commenced and continued a proceeding to dissolve their marriage; or
- (3) when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home.

**Cross References.** Section 5325 is referred to in sections 5323, 5326, 5328 of this title.

**§ 5326. Effect of adoption.**

Any rights to seek physical custody or legal custody rights and any custody rights that have been granted under section 5324 (relating to standing for any form of physical custody or legal custody) or 5325 (relating to standing for partial physical custody and supervised physical custody) to a grandparent or great-grandparent prior to the adoption of the child by an individual other than a stepparent, grandparent or great-grandparent shall be automatically terminated upon such adoption.

**§ 5327. Presumption in cases concerning primary physical custody.**

(a) **Between parents.**--In any action regarding the custody of the child between the parents of the child, there shall be no presumption that custody should be awarded to a particular parent.

(b) **Between a parent and third party.**--In any action regarding the custody of the child between a parent of the child and a nonparent, there shall be a presumption that custody shall be awarded to the parent. The presumption in favor of the parent may be rebutted by clear and convincing evidence.

(c) **Between third parties.**--In any action regarding the custody of the child between a nonparent and another nonparent, there shall be no presumption that custody should be awarded to a particular party.

**§ 5328. Factors to consider when awarding custody.**

(a) **Factors.**--In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:

- (1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.
- (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
- (3) The parental duties performed by each party on behalf of the child.
- (4) The need for stability and continuity in the child's education, family life and community life.
- (5) The availability of extended family.
- (6) The child's sibling relationships.
- (7) The well-reasoned preference of the child, based on the child's maturity and judgment.
- (8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.
- (9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.
- (10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.
- (11) The proximity of the residences of the parties.
- (12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.
- (13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.
- (14) The history of drug or alcohol abuse of a party or member of a party's household.
- (15) The mental and physical condition of a party or member of a party's household.
- (16) Any other relevant factor.



**(b) Gender neutral.**--In making a determination under subsection (a), no party shall receive preference based upon gender in any award granted under this chapter.

**(c) Grandparents and great-grandparents.--**

(1) In ordering partial physical custody or supervised physical custody to a party who has standing under section 5325(1) or (2) (relating to standing for partial physical custody and supervised physical custody), the court shall consider the following:

- (i) the amount of personal contact between the child and the party prior to the filing of the action;
- (ii) whether the award interferes with any parent-child relationship; and
- (iii) whether the award is in the best interest of the child.

(2) In ordering partial physical custody or supervised physical custody to a parent's parent or grandparent who has standing under section 5325(3), the court shall consider whether the award:

- (i) interferes with any parent-child relationship; and
- (ii) is in the best interest of the child.

**Cross References.** Section 5328 is referred to in section 5323 of this title.

**§ 5329. Consideration of criminal conviction.**

**(a) Offenses.**--Where a party seeks any form of custody, the court shall consider whether that party or member of that party's household has been convicted of or has pleaded guilty or no contest to any of the offenses in this section or an offense in another jurisdiction substantially equivalent to any of the offenses in this section. The court shall consider such conduct and determine that the party does not pose a threat of harm to the child before making any order of custody to that parent when considering the following offenses:

- 18 Pa.C.S. Ch. 25 (relating to criminal homicide).
- 18 Pa.C.S. § 2702 (relating to aggravated assault).
- 18 Pa.C.S. § 2706 (relating to terroristic threats).
- 18 Pa.C.S. § 2709.1 (relating to stalking).
- 18 Pa.C.S. § 2901 (relating to kidnapping).
- 18 Pa.C.S. § 2902 (relating to unlawful restraint).
- 18 Pa.C.S. § 2903 (relating to false imprisonment).
- 18 Pa.C.S. § 2910 (relating to luring a child into a motor vehicle or structure).
- 18 Pa.C.S. § 3121 (relating to rape).
- 18 Pa.C.S. § 3122.1 (relating to statutory sexual assault).
- 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).
- 18 Pa.C.S. § 3124.1 (relating to sexual assault).
- 18 Pa.C.S. § 3125 (relating to aggravated indecent assault).
- 18 Pa.C.S. § 3126 (relating to indecent assault).
- 18 Pa.C.S. § 3127 (relating to indecent exposure).
- 18 Pa.C.S. § 3129 (relating to sexual intercourse with animal).
- 18 Pa.C.S. § 3130 (relating to conduct relating to sex offenders).
- 18 Pa.C.S. § 3301 (relating to arson and related offenses).
- 18 Pa.C.S. § 4302 (relating to incest).
- 18 Pa.C.S. § 4303 (relating to concealing death of child).
- 18 Pa.C.S. § 4304 (relating to endangering welfare of children).

18 Pa.C.S. § 4305 (relating to dealing in infant children).  
18 Pa.C.S. § 5902(b) (relating to prostitution and related offenses).  
18 Pa.C.S. § 5903(c) or (d) (relating to obscene and other sexual materials and performances).  
18 Pa.C.S. § 6301 (relating to corruption of minors).  
18 Pa.C.S. § 6312 (relating to sexual abuse of children).  
18 Pa.C.S. § 6318 (relating to unlawful contact with minor).  
18 Pa.C.S. § 6320 (relating to sexual exploitation of children).  
Section 6114 (relating to contempt for violation of order or agreement).  
The former 75 Pa.C.S. § 3731 (relating to driving under influence of alcohol or controlled substance).  
75 Pa.C.S. Ch. 38 (relating to driving after imbibing alcohol or utilizing drugs).  
Section 13(a)(1) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, to the extent that it prohibits the manufacture, sale or delivery, holding, offering for sale or possession of any controlled substance or other drug or device.

**(b) Parent convicted of murder.--**No court shall award custody, partial custody or supervised physical custody to a parent who has been convicted of murder under 18 Pa.C.S. § 2502(a) (relating to murder) of the other parent of the child who is the subject of the order unless the child is of suitable age and consents to the order.

**(c) Initial evaluation.--**At the initial in-person contact with the court, the judge, conference officer or other appointed individual shall perform an initial evaluation to determine whether the party or household member who committed an offense under subsection (a) poses a threat to the child and whether counseling is necessary. The initial evaluation shall not be conducted by a mental health professional. After the initial evaluation, the court may order further evaluation or counseling by a mental health professional if the court determines it is necessary.

**(d) Counseling.--**

(1) Where the court determines under subsection (c) that counseling is necessary, it shall appoint a qualified professional specializing in treatment relating to the particular offense to provide counseling to the offending individual.

(2) Counseling may include a program of treatment or individual therapy designed to rehabilitate the offending individual which addresses, but is not limited to, issues regarding physical and sexual abuse, the psychology of the offender and the effects of the offense on the victim.

**(e) Subsequent evaluation.--**

(1) At any time during or subsequent to the counseling under subsection (d), the court may require another evaluation to determine whether further counseling is necessary.

(2) If the court awards custody to a party who committed an offense under subsection (a) or who shares a household with an individual who committed an offense under subsection (a), the court may require subsequent evaluations on the rehabilitation of the offending individual and the well-being of the child subsequent to the order. If, upon review of a subsequent evaluation, the court determines that the offending individual poses a threat of physical, emotional or psychological harm to the child, the court may schedule a hearing to modify the custody order.

**(f) Costs.**--The court may order a party to pay all or part of the costs of the counseling and evaluations under this section.  
(Apr. 12, 2012, P.L.241, No.32, eff. 60 days)

**2012 Amendment.** Act 32 amended subsec. (c).

**Cross References.** Section 5329 is referred to in section 5330 of this title; section 1904 of Title 42 (Judiciary and Judicial Procedure).

### **§ 5330. Consideration of criminal charge.**

**(a) Expedited hearing.**--A party who has obtained information under 42 Pa.C.S. § 1904 (relating to availability of criminal charge information in child custody proceedings) or otherwise about a charge filed against the other party for an offense listed under section 5329(a) (relating to consideration of criminal conviction) may move for a temporary custody order or modification of an existing custody order. The court shall hold the hearing under this subsection in an expeditious manner.

**(b) Risk of harm.**--In evaluating any request under subsection (a), the court shall consider whether the party who is or has been charged with an offense set forth in section 5329(a) poses a risk of physical, emotional or psychological harm to the child.

**(c) No prejudice.**--Failure to either apply for information under 42 Pa.C.S. § 1904 or act under this section shall not prejudice any party in a custody proceeding.

### **§ 5331. Parenting plan.**

**(a) Purpose.**--In a contested custody proceeding, the court may require the parties to submit parenting plans for the care and custody of the child to aid the court in resolving the custody dispute. A parenting plan and the position of a party as set forth in that parenting plan shall not be admissible as evidence by another party.

**(b) Contents.**--A parenting plan shall include the following:

- (1) The schedule for personal care and control of the child, including parenting time, holidays and vacations.
- (2) The education and religious involvement, if any, of the child.
- (3) The health care of the child.
- (4) Child-care arrangements.
- (5) Transportation arrangements.
- (6) A procedure by which proposed changes, disputes and alleged breaches of the custody order may be adjudicated or otherwise resolved through mediation, arbitration or other means.
- (7) Any matter specified by the court.
- (8) Any other matter that serves the best interest of the child.

(c) **Form.**--If the court orders the parties to propose a parenting plan, it shall be submitted to the court in substantially the following form:

CAPTION  
PARENTING PLAN

This parenting plan involves the following child/children:

Child's Name	Age	Where does this child live?
1.....	.....	.....
2.....	.....	.....
3.....	.....	.....

If you have children not addressed by this parenting plan, name here:

Child's Name	Age	Where does this child live?
1.....	.....	.....
2.....	.....	.....
3.....	.....	.....

Legal Custody (who makes decisions about certain things):

Circle one

- Diet..... Both parties decide together / Plaintiff / Defendant
- Religion..... Both parties decide together / Plaintiff / Defendant
- Medical Care... Both parties decide together / Plaintiff / Defendant
- Mental Health Care... Both parties decide together / Plaintiff / Defendant
- Discipline..... Both parents decide together / Plaintiff / Defendant
- Choice of School.... Both parents decide together / Plaintiff / Defendant
- Choice of Study..... Both parents decide together / Plaintiff / Defendant
- School Activities... Both parents decide together / Plaintiff / Defendant
- Sports Activities... Both parents decide together / Plaintiff / Defendant
- Additional Items... Both parents decide together / Plaintiff / Defendant

Explain what process you will use to make decisions?

(For example, the parent confronted with or anticipating the choice will call the other parent when the choice presents itself, and the other parent must agree or disagree within 24 hours of any deadline)

.....  
Physical Custody (where the child/children live)

The child's/children's residence is with.....

Describe which days and which times of the day the child/children will be with each person:

Sunday Monday Tuesday Wednesday Thursday Friday Saturday

.....  
Describe where and when the child/children will be dropped off and/or picked up (day and time of day)?

Drop-Off

Where.....

When.....

Pick-Up

Where .....

When .....

.....  
If one of you doesn't show up, how long will the other wait?.....

If there are any extraordinary costs (taxi, train, airplane, etc.), who will pay for which costs?

.....  
 .....  
**HOLIDAYS**

Where will the child/children stay?

HOLIDAY	YEAR A	YEAR B	EVERY YEAR
Martin Luther King Day	.....	.....	.....
President's Day	.....	.....	.....
Easter	.....	.....	.....
Memorial Day	.....	.....	.....
Fourth of July	.....	.....	.....
Labor Day	.....	.....	.....
Yom Kippur	.....	.....	.....
Rosh Hashanah	.....	.....	.....
Thanksgiving	.....	.....	.....
Vacation after Thanksgiving	.....	.....	.....
Christmas Vacation	.....	.....	.....
Kwanzaa	.....	.....	.....
New Year's Eve/Day	.....	.....	.....
Spring Vacation	.....	.....	.....
Easter Sunday	.....	.....	.....
Child's Birthday	.....	.....	.....
Mother's Day	.....	.....	.....
Father's Day	.....	.....	.....
Other	.....	.....	.....
Other	.....	.....	.....
Other	.....	.....	.....
Summer Vacation Plans			

.....  
 .....  
**Special Activities or School Activities**

Child's Name	Activity	Will both of you attend? If not, which of you will attend?
.....	.....	.....
.....	.....	.....
.....	.....	.....

**Temporary changes to this parenting schedule**

From time to time, one of you might want or need to rearrange the parenting time schedule due to work, family or other events. You can attempt to agree on these changes. If you cannot agree, the parent receiving the request will make the final decision.

The parent asking for the change will ask.....in person.....by letter/mail.....by phone

No later than

....12 hours..... 24 hours.... 1 week..... 1 month

The parent being asked for a change will reply

.... in person..... by letter/mail..... by phone

No later than

..... 12 hours..... 24 hours..... 1 week..... 1 month

May parents contact one another?.....

When the child/children is/are with one of you, how may they contact the other parent?.....

When and how may .....contact the child?

In the event that proposed changes, disputes or alleged breaches of this parenting plan and custody order are necessary or desired, the parties agree that such changes will be addressed by the following method (specify method of arbitration, mediation, court action, etc.):

The following matter or matters as specified by the court:

Other (Anything else you want to agree on):

Date.....

Signature of Mother

Date.....

Signature of Father

Date.....

Signature of Witness

**§ 5332. Informational programs.**

(a) **Attendance.**--The court may direct the parties to attend informational programs concerning parental duties.

(b) **Process not delayed.**--Subsequent proceedings and the entry of any order or decree shall not be delayed because of the lack of participation in any informational program by one of the parties.

(c) **Costs.**--The court may order a party to pay all or part of the costs of the informational programs under this section.

**§ 5333. Counseling as part of order.**

(a) **Attendance.**--The court may, as part of a custody order, require the parties to attend counseling sessions.

(b) **Abuse.**--In situations involving abuse, the court may order individual counseling for the abuser but may not order the parties to attend joint counseling.

(c) **Verification.**--Each party's participation in the counseling sessions shall be verified by the counselor.

(d) **Costs.**--The court may order a party to pay all or part of the costs of the counseling sessions under this section.

**§ 5334. Guardian ad litem for child.**

**(a) Appointment.--**The court may on its own motion or the motion of a party appoint a guardian ad litem to represent the child in the action. The court may assess the cost upon the parties or any of them or as otherwise provided by law. The guardian ad litem must be an attorney at law.

**(b) Powers and duties.--**The guardian ad litem shall be charged with representation of the legal interests and the best interests of the child during the proceedings and shall do all of the following:

(1) If appropriate to the child's age and maturity, meet with the child as soon as possible following the appointment and on a regular basis thereafter.

(2) On a timely basis, be given access to relevant court records, reports of examination of the parents or other custodian of the child and medical, psychological and school records.

(3) Participate in all proceedings.

(4) Conduct such further investigation necessary to ascertain relevant facts for presentation to the court.

(5) Interview potential witnesses, including the child's parents and caretakers, if any. The guardian ad litem may examine and cross-examine witnesses and present witnesses and evidence necessary to protect the best interests of the child.

(6) Make specific recommendations in a written report to the court relating to the best interests of the child, including any services necessary to address the child's needs and safety. The court shall make the written report part of the record so that it may be reviewed by the parties. The parties may file with the court written comments regarding the contents of the report. The comments filed by the parties shall also become part of the record.

(7) Explain the proceedings to the child to the extent appropriate given the child's age, mental condition and emotional condition.

(8) Advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes. When appropriate because of the age or mental and emotional condition of the child, determine to the fullest extent possible the wishes of the child and communicate this information to the court. A difference between the child's wishes under this paragraph and the recommendations under paragraph (6) shall not be considered a conflict of interest for the guardian ad litem.

**(c) Abuse.--**If substantial allegations of abuse of the child are made, the court shall appoint a guardian ad litem for the child if:

(1) counsel for the child is not appointed under section 5335 (relating to counsel for child); or

(2) the court is satisfied that the relevant information will be presented to the court only with such appointment.

**(d) Evidence subject to examination.--**A guardian ad litem may not testify except as authorized by Rule 3.7 of the Rules of Professional Conduct, but may make legal argument based on relevant evidence that shall be subject to examination by the parties.

(e) **Costs.**--The court may order a party to pay all or part of the costs of appointing a guardian ad litem under this section.

**§ 5335. Counsel for child.**

(a) **Appointment.**--The court may appoint counsel to represent the child if the court determines that the appointment will assist in resolving the issues in the custody proceeding. If a child has legal counsel and a guardian ad litem, counsel shall represent the legal interests of the child and the guardian ad litem shall represent the best interests of the child.

(b) **Abuse.**--Substantial allegations of abuse of the child constitute a reasonable basis for appointing counsel for the child.

(c) **Not subject to examination.**--Counsel appointed by the court for the child shall not be subject to examination unless such counsel testifies in the matter.

(d) **Costs.**--The court may order a party to pay all or part of the costs of appointing counsel for the child under this section.

**Cross References.** Section 5335 is referred to in section 5334 of this title.

**§ 5336. Access to records and information.**

(a) **General rule.**--Except as provided in subsections (b) and (c):

(1) A party granted sole or shared legal custody under section 5323 (relating to award of custody) shall be provided access to:

- (i) the medical, dental, religious and school records of the child;
- (ii) the address of the child and any other party; and
- (iii) any other information that the court deems necessary or proper.

(2) Access to any records and information pertaining to the child may not be denied solely based upon a parent's physical custody schedule.

(3) Upon request, a parent, party or entity possessing any information set forth in paragraph (1) shall provide it to any party granted sole or shared legal custody.

(b) **Nondisclosure of confidential information.**--The court shall not order the disclosure of any of the following information to any parent or party granted custody:

- (1) The address of a victim of abuse.
- (2) Confidential information from an abuse counselor or shelter.
- (3) Information protected under Chapter 67 (relating to domestic and sexual violence victim address confidentiality).
- (4) Information independently protected from disclosure by the child's right to confidentiality under the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, or any other statute.

(c) **Other information.**--The court may determine not to release information set forth in subsection (a), in which case it shall state the reason for its denial on the record.

**Cross References.** Section 5336 is referred to in section 5337 of this title.



**§ 5337. Relocation.**

**(a) Applicability.--**This section applies to any proposed relocation.

**(b) General rule.--**No relocation shall occur unless:

(1) every individual who has custody rights to the child consents to the proposed relocation; or

(2) the court approves the proposed relocation.

**(c) Notice.--**

(1) The party proposing the relocation shall notify every other individual who has custody rights to the child.

(2) Notice, sent by certified mail, return receipt requested, shall be given no later than:

(i) the 60th day before the date of the proposed relocation; or

(ii) the tenth day after the date that the individual knows of the relocation, if:

(A) the individual did not know and could not reasonably have known of the relocation in sufficient time to comply with the 60-day notice; and

(B) it is not reasonably possible to delay the date of relocation so as to comply with the 60-day notice.

(3) Except as provided by section 5336 (relating to access to records and information), the following information, if available, must be included with the notice of the proposed relocation:

(i) The address of the intended new residence.

(ii) The mailing address, if not the same as the address of the intended new residence.

(iii) Names and ages of the individuals in the new residence, including individuals who intend to live in the new residence.

(iv) The home telephone number of the intended new residence, if available.

(v) The name of the new school district and school.

(vi) The date of the proposed relocation.

(vii) The reasons for the proposed relocation.

(viii) A proposal for a revised custody schedule.

(ix) Any other information which the party proposing the relocation deems appropriate.

(x) A counter-affidavit as provided under subsection (d)(1) which can be used to object to the proposed relocation and the modification of a custody order.

(xi) A warning to the nonrelocating party that if the nonrelocating party does not file with the court an objection to the proposed relocation within 30 days after receipt of the notice, that party shall be foreclosed from objecting to the relocation.

(4) If any of the information set forth in paragraph (3) is not known when the notice is sent but is later made known to the party proposing the relocation, then that party shall promptly inform every individual who received notice under this subsection.

**(d) Objection to proposed relocation.--**

(1) A party entitled to receive notice may file with the court an objection to the proposed relocation and seek a temporary or permanent order to prevent the relocation. The nonrelocating party shall have the opportunity to indicate whether he objects to relocation or

not and whether he objects to modification of the custody order or not. If the party objects to either relocation or modification of the custody order, a hearing shall be held as provided in subsection (g)(1). The objection shall be made by completing and returning to the court a counter-affidavit, which shall be verified subject to penalties under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities), in substantially the following form:

COUNTER-AFFIDAVIT REGARDING RELOCATION

This proposal of relocation involves the following child/children:

Child's Name	Age	Currently residing at:
.....	.....	.....
Child's Name	Age	Currently residing at:
.....	.....	.....
Child's Name	Age	Currently residing at:
.....	.....	.....

I have received a notice of proposed relocation and

1. .... I do not object to the relocation and I do not object to the modification of the custody order consistent with the proposal for revised custody schedule as attached to the notice.
2. .... I do not object to the relocation, but I do object to modification of the custody order, and I request that a hearing be scheduled:
  - a. .... Prior to allowing (name of child/children) to relocate.
  - b. .... After the child/children relocate.
3. .... I do object to the relocation and I do object to the modification of the custody order, and I further request that a hearing be held on both matters prior to the relocation taking place.

.....  
I understand that in addition to checking (2) or (3) above, I must also file this notice with the court in writing and serve it on the other party by certified mail, return receipt requested. If I fail to do so within 30 days of my receipt of the proposed relocation notice, I shall be foreclosed from objecting to the relocation.

.....  
I verify that the statements made in this counter-affidavit are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date:  
.....

(2) An objection made under this subsection shall be filed with the court within 30 days of receipt of the proposed relocation notice and served on the other party by certified mail, return receipt requested.

(3) If notice of the proposed relocation has been properly given and no objection to the proposed relocation has been filed in court, then it shall be presumed that the nonrelocating party has consented to the proposed relocation.

(4) If a party who has been given proper notice does not file with the court an objection to the relocation within 30 days after receipt of the notice but later petitions the court for review of the custodial arrangements, the court shall not accept testimony challenging the relocation.

**(e) Confirmation of relocation.**--If no objection to the proposed relocation is filed under subsection (d), the party proposing the relocation shall file the following with the court prior to the relocation:

- (1) an affidavit stating that the party provided notice to every individual entitled to notice, the time to file an objection to the proposed relocation has passed and no individual entitled to receive notice has filed an objection to the proposed relocation;
- (2) Proof that proper notice was given in the form of a return receipt with the signature of the addressee and the full notice that was sent to the addressee.
- (3) a petition to confirm the relocation and modify any existing custody order; and
- (4) a proposed order containing the information set forth in subsection (c)(3).

**(f) Modification of custody order.--**If a counter-affidavit regarding relocation is filed with the court which indicates the nonrelocating party both has no objection to the proposed relocation and no objection to the modification of the custody order consistent with the proposal for revised custody schedule, the court may modify the existing custody order by approving the proposal for revised custody schedule submitted under subsection (c)(3)(viii), and shall specify the method by which its future modification can be made if desired by either party. If a counter-affidavit regarding relocation is filed with the court which indicates the nonrelocating party objects either to the proposed relocation or to the modification of the custody order consistent with the proposal for revised custody schedule, the court shall modify the existing custody order only after holding a hearing to establish the terms and conditions of the order pursuant to the relocation indicating the rights, if any, of the nonrelocating parties.

**(g) Hearing.--**

(1) Except as set forth in paragraph (3), the court shall hold an expedited full hearing on the proposed relocation after a timely objection has been filed and before the relocation occurs.

(2) Except as set forth in paragraph (3), the court may, on its own motion, hold an expedited full hearing on the proposed relocation before the relocation occurs.

(3) Notwithstanding paragraphs (1) and (2), if the court finds that exigent circumstances exist, the court may approve the relocation pending an expedited full hearing.

(4) If the court approves the proposed relocation, it shall:

- (i) modify any existing custody order; or
- (ii) establish the terms and conditions of a custody order.

**(h) Relocation factors.--**In determining whether to grant a proposed relocation, the court shall consider the following factors, giving weighted consideration to those factors which affect the safety of the child:

(1) The nature, quality, extent of involvement and duration of the child's relationship with the party proposing to relocate and with the nonrelocating party, siblings and other significant persons in the child's life.

(2) The age, developmental stage, needs of the child and the likely impact the relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.

(3) The feasibility of preserving the relationship between the nonrelocating party and the child through suitable custody arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's preference, taking into consideration the age and maturity of the child.

(5) Whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party.

(6) Whether the relocation will enhance the general quality of life for the party seeking the relocation, including, but not limited to, financial or emotional benefit or educational opportunity.

(7) Whether the relocation will enhance the general quality of life for the child, including, but not limited to, financial or emotional benefit or educational opportunity.

(8) The reasons and motivation of each party for seeking or opposing the relocation.

(9) The present and past abuse committed by a party or member of the party's household and whether there is a continued risk of harm to the child or an abused party.

(10) Any other factor affecting the best interest of the child.

**(i) Burden of proof.--**

(1) The party proposing the relocation has the burden of establishing that the relocation will serve the best interest of the child as shown under the factors set forth in subsection (h).

(2) Each party has the burden of establishing the integrity of that party's motives in either seeking the relocation or seeking to prevent the relocation.

**(j) Failure to provide reasonable notice.--**The court may consider a failure to provide reasonable notice of a proposed relocation as:

(1) a factor in making a determination regarding the relocation;

(2) a factor in determining whether custody rights should be modified;

(3) a basis for ordering the return of the child to the nonrelocating party if the relocation has occurred without reasonable notice;

(4) sufficient cause to order the party proposing the relocation to pay reasonable expenses and counsel fees incurred by the party objecting to the relocation; and

(5) a ground for contempt and the imposition of sanctions against the party proposing the relocation.

**(k) Mitigation.--**Any consideration of a failure to provide reasonable notice under subsection (i) shall be subject to mitigation if the court determines that such failure was caused in whole, or in part, by abuse.

**(l) Effect of relocation prior to hearing.--**If a party relocates with the child prior to a full expedited hearing, the court shall not confer any presumption in favor of the relocation.

**Cross References.** Section 5337 is referred to in section 5323 of this title.

**§ 5338. Modification of existing order.**

**(a) Best interest of the child.--**Upon petition, a court may modify a custody order to serve the best interest of the child.

**(b) Applicability.--**Except as provided in 51 Pa.C.S. § 4109 (relating to child custody proceedings during military deployment), this section shall apply to any custody order entered by a court of this Commonwealth or any other state subject to the jurisdictional requirements set forth in Chapter 54 (relating to uniform child custody jurisdiction and enforcement).

(Apr. 12, 2012, P.L.241, No.32, eff. 60 days)

**§ 5339. Award of counsel fees, costs and expenses.**

Under this chapter, a court may award reasonable interim or final counsel fees, costs and expenses to a party if the court finds that the conduct of another party was obdurate, vexatious, repetitive or in bad faith.

**§ 5340. Court-appointed child custody health care or behavioral health practitioners.**

No party to a child custody matter in which the court has appointed a licensed health care or behavioral health practitioner to assist the court by conducting an examination or evaluation of the parties involved or making a recommendation concerning a child custody agreement or order may be permitted to file a complaint against the practitioner with the practitioner's State licensing board prior to the final agreement or order being issued and for 60 days thereafter. As used in this section, "licensed health care or behavioral health practitioner" means a person who is licensed, certified, accredited or otherwise regulated by the Commonwealth to provide health care or behavioral health services.

## **Appendix F-4: PA Custody Rules**

## CHAPTER 1915. ACTIONS FOR CUSTODY, PARTIAL CUSTODY AND VISITATION OF MINOR CHILDREN

### Rule

- 1915.1. Scope. Definitions.
- 1915.2. Venue.
- 1915.3. Commencement of Action. Complaint. Order.
- 1915.4. Prompt Disposition of Custody Cases.
- 1915.4-1. Alternative Hearing Procedures.
- 1915.4-2. Office Conference. Hearing. Record. Exceptions. Order.
- 1915.4-3. Non-Record Proceedings. Trial.
- 1915.5. Question of Jurisdiction or Venue. No Responsive Pleading by Defendant Required. Counterclaim. Discovery.
- 1915.6. Joinder of Parties.
- 1915.7. Consent Order.
- 1915.8. Physical and Mental Examination of Persons.
- 1915.9. No Default Judgment.
- 1915.10. Decision.
- 1915.11. Appointment of Attorney for Child. Interrogation of Child. Attendance at Hearing or Conference.
- 1915.12. Civil Contempt for Disobedience of Custody Order. Petition. Form of Petition. Service. Order.
- 1915.13. Special Relief.
- 1915.14. Disobedience of Order. Arrest. Contempt.
- 1915.15. Form of Complaint. Caption. Order. Petition to Modify a Partial Custody or Visitation Order.
- 1915.16. Form of Order and Notice. Joinder. Intervention.
- 1915.18. Form of Order Directing Expert Examination and Report.
- 1915.24. Acts of Assembly Not Suspended.
- 1915.25. Suspension of Acts of Assembly.

### Source

The provisions of these Rules 1915.1—1915.25 adopted December 10, 1981, effective July 1, 1982, 12 Pa.B. 867; by order of June 25, 1982 and November 8, 1982, the effective date was extended to January 1, 1983, 12 Pa.B. 2169 and 12 Pa.B. 4040, unless otherwise noted.

### **Rule 1915.1. Scope. Definitions.**

(a)(1) These rules govern the practice and procedure in all actions for custody, partial custody and visitation of minor children, including habeas corpus proceedings therefor and claims for custody, partial custody or visitation asserted in an action of divorce or support.

## Official Note

The term custody includes legal custody, physical custody and shared custody. See Definition Rule 1915.1(b).

Divorce Rule 1920.32(a) provides that when a claim for custody is joined with the action of divorce, the practice and procedure governing the claim for custody shall be in accordance with these rules.

(2) If a claim for partial custody or visitation is raised during the course of an action for support, the court may

(i) enter an order with respect to the right to partial custody or visitation where there is

(A) proper venue under Rule 1915.2, and

(B) no current order of custody, partial custody or visitation outstanding, and

(C) no objection by a party to the determination of the claim, and

(D) no delay in the entry of the support order resulting from the determination of the claim; or

## Official Note

See *Myers v. Young*, 285 Pa. Super. 254, 427 A.2d 209, 211 (1981), which held that “the trial court properly declined to defer the entry of an order of support until satisfactory visitation rights had been established.”

(ii) require the commencement of a separate action pursuant to these rules.

## Official Note

See 23 Pa.C.S. § 4349 which authorizes custody and visitation proceedings to be consolidated with support proceedings “to facilitate frequent and unimpeded contact between children and parents” if the custody or visitation matter may be “fairly and expeditiously . . . determined and disposed of in the support action or proceeding.”

(b) As used in this chapter, unless the context of a rule indicates otherwise,

“action” means all proceedings for custody, partial custody or visitation, and proceedings for modification of prior orders of any court;

“custody” means the legal right to keep, control, guard, care for and preserve a child and includes the terms “legal custody,” “physical custody,” and “shared custody;”



“home county” means the county in which the child immediately preceding the time involved lived with the child’s parents, a parent, or a person acting as parent, or in an institution, for at least six consecutive months, and in the case of a child less than six months old the county in which the child lived from birth with any of the persons mentioned. A period of temporary absence of the child from the physical custody of the parent, institution, or person acting as parent shall not affect the six-month or other period;

“legal custody” means the legal right to make major decisions affecting the best interests of a minor child, including but not limited to, medical, religious and educational decisions;

“partial custody” means the right to take possession of a child away from the custodial person for a certain period of time;

“person acting as parent” means a person other than a parent, including an institution, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

“physical custody” means actual physical possession and control of a child;

“shared custody” means shared legal or shared physical custody or both of a child in such a way as to assure the child of frequent and continuing contact, including physical access, to both parents; and

“visitation” means the right to visit a child, but does not include the right to remove the child from the custodial person’s control.

#### Official Note

The definitions of the terms legal custody, physical custody and shared custody are taken from 23 Pa.C.S. § 5302.

For additional definitions, see the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S. § 5343.

#### Source

The provisions of this Rule 1915.1 amended November 8, 1982, effective January 1, 1983, 12 Pa.B. 4040; amended November 7, 1988, effective January 1, 1989, 18 Pa.B. 5323; amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943. Immediately preceding text appears at serial pages (157269) to (157270) and (134343).

#### **Rule 1915.2. Venue.**

(a) An action may be brought in any county

(1)(i) which is the home county of the child at the time of commencement of the proceeding, or

(ii) which had been the child's home county within six months before commencement of the proceeding and the child is absent from the county because of the child's removal or retention by a person claiming the child's custody or for other reasons and a parent or person acting as parent continues to live in the county; or

(2) in which it is in the best interest of the child that the court decide the matter because the child and the child's parents, or the child and at least one party, have a significant connection with the county and there is available within the county substantial evidence concerning the child's present or future care, protection, training and personal relationships; or

(3) in which the child is physically present and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) in which it appears that venue would not be proper in any other county under prerequisites substantially in accordance with paragraphs (1), (2) or (3), or another court has declined to decide the matter on the ground that the court before which the action is pending is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that the court decide the matter.

(b) Except under paragraphs (3) and (4) of subdivision (a), physical presence of the child within a county, or of the child and one of the parties, is not alone sufficient to establish venue.

(c) Physical presence of the child, while desirable, is not a prerequisite to venue.

(d) For the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought or could be brought at the time of filing the petition to transfer. It shall be the duty of the prothonotary of the court in which the action is pending to forward to the prothonotary of the county to which the action is transferred certified copies of the docket entries, process, pleadings and other papers filed in the action. The costs and fees of the petition for transfer and the removal of the record shall be paid by the petitioner in the first instance to be taxable as costs in the case.

#### Official Note

Under the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S. § 5341 et seq., the court may decline to exercise its jurisdiction in a particular action despite the action having been brought in a county of proper venue. Section 5347 of the Domestic Relations Code, relating to simultaneous proceedings in other courts, provides for the mandatory refusal by the court to exercise its jurisdiction in an action. Section 5348 of the Code, relating to

inconvenient forum, and Sections 5349 and 5364(f) of the Code, relating to jurisdiction declined by reason of conduct, provide for the discretionary refusal by the court to exercise its jurisdiction. See 23 Pa.C.S. § § 5347, 5348, 5349 and 5364(f).

### Source

The provisions of this Rule 1915.2 amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943. Immediately preceding text appears at serial pages (134343) to (134344).

### **Rule 1915.3. Commencement of Action. Complaint. Order.**

(a) Except as provided by subdivision (c), an action shall be commenced by filing a verified complaint substantially in the form provided by Rule 1915.15(a).

(b) An order shall be attached to the complaint directing the defendant to appear at a time and place specified. The order shall be substantially in the form provided by rule 1915.15(b).

#### Official Note

See Section 5352(c) of the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S. § 5352(c), relating to costs and expenses for appearance of parties and child, and Section 5364(a), 23 Pa.C.S. § 5364(a), relating to intrastate application of the Uniform Act.

(c) A claim for custody, partial custody or visitation which is joined with an action of divorce shall be asserted in the complaint or a subsequent petition, which shall be substantially in the form provided by Rule 1915.15(a).

#### Official Note

Divorce Rule 1920.13(b) provides that claims which may be joined with an action of divorce shall be raised by the complaint or a subsequent petition.

(d) If the mother of the child is not married and the child has no legal or presumptive father, then a putative father initiating an action for custody, partial custody or visitation must file a claim of paternity pursuant to 23 Pa.C.S. § 5103 and attach a copy to the complaint in the custody action.

#### Official Note

If a putative father is uncertain of paternity, the correct procedure is to commence a civil action for paternity pursuant to the procedures set forth at Rule 1930.6.

(e) A grandparent seeking physical and/or legal custody of a grandchild pursuant to 23 Pa.C.S. § 5313(b) must plead, in paragraph 7 of the complaint set forth at Rule

1915.15(a), facts establishing the elements of a cause of action under §§ 5313(b)(1), (2) and (3).

### Source

The provisions of this Rule 1915.3 amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943; amended October 30, 2001, effective immediately, 31 Pa.B. 6273; amended October 31, 2002, effective immediately, 32 Pa.B. 5632. Immediately preceding text appears at serial pages (285552) to (285553).

### **Rule 1915.4. Prompt Disposition of Custody Cases.**

(a) *Initial Contact With the Court.* Depending upon the procedure in the judicial district, the parties' initial in-person contact with the court (including, but not limited to a conference with a conference officer pursuant to Rule 1915.4-2, a conference with a judge, conciliation, mediation and/or class/seminar) shall be scheduled to occur not later than 45 days from the filing of a complaint or petition.

(b) *Listing Trials Before the Court.* Depending upon the procedure in the judicial district, within 180 days of the filing of the complaint either the court shall automatically enter an order scheduling a trial before a judge or a party shall file a praecipe, motion or request for trial, except as otherwise provided in this subdivision. If it is not the practice of the court to automatically schedule trials and neither party files a praecipe, motion or request for trial within 180 days of filing of the pleading, the court shall dismiss the matter unless the moving party has been granted an extension for good cause shown, which extension shall not exceed 60 days beyond the 180 day limit.

(c) *Trial.* Trials before a judge shall commence within 90 days of the date the scheduling order is entered. Trials and hearings shall be scheduled to be heard on consecutive days whenever possible but, if not on consecutive days, then the trial or hearing shall be concluded not later than 45 days from commencement.

(d) *Prompt Decisions.* The judge's decision shall be entered and filed within 15 days of the date upon which the trial is concluded unless, within that time, the court extends the date for such decision by order entered of record showing good cause for the extension. In no event shall an extension delay the entry of the court's decision more than 45 days after the conclusion of trial.

(e) *Emergency or Special Relief.* Nothing in this rule shall preclude a party from seeking, nor a court from ordering, emergency or interim special relief at any time after the commencement of the action.

#### Official Note:

For service of original process in custody, partial custody and visitation matters, see Rule 1930.4.

Rescinded June 20, 1985, effective Jan 1, 1986. Note amended Oct. 2, 1995, effective Jan.1, 1996. Replaced by new rule.

**Source**

The provisions of this Rule 1915.4 rescinded June 20, 1985, effective January 1, 1986, 15 Pa.B. 2452; amended October 2, 1995, effective January 1, 1996, 25 Pa.B. 4518; amended November 30, 2000, effective March 1, 2001, 30 Pa.B. 6423. Immediately preceding text appears at serial page (231369).

**Rule 1915.4-1. Alternative Hearing Procedures for Partial Custody or Visitation Actions.**

(a) A custody action shall proceed as prescribed by Rule 1915.4-3 unless the court, by local rule, adopts the alternative hearing procedure authorized by Rule 1915.4-2 pursuant to which an action for partial custody or visitation may be heard by a hearing officer, except as provided in subdivision (b) below.

(b) Promptly after the parties' initial contact with the court as set forth in Rule 1915.4(a), a party may move the court for a hearing before a judge, rather than a hearing officer, in an action for partial custody or visitation where:

- (1) there are complex questions of law, fact or both, or
- (2) the parties certify to the court that there are serious allegations affecting the child's welfare.

(c) The president judge or the administrative judge of the family division of each county shall certify that custody proceedings generally are conducted in accordance with either Rule 1915.4-2 or Rule 1915.4-3. The certification shall be filed with the Domestic Relations Procedural Rules Committee of the Supreme Court of Pennsylvania and shall be substantially in the following form:

I hereby certify that \_\_\_\_\_ County conducts its custody proceedings in accordance with Rule \_\_\_\_\_

(President Judge) (Administrative Judge)

*Note:* Pursuant to Rule 1915.4-1, the following counties have certified to the Domestic Relations Procedural Rules Committee that their custody proceedings generally are conducted in accordance with the rule specified below:

COUNTY	RULE
Adams	
Allegheny	

Armstrong  
Beaver  
Bedford  
Berks  
Blair  
Bradford  
Bucks  
Butler  
Cambria  
Cameron  
Carbon  
Centre  
Chester  
Clarion  
Clearfield  
Clinton  
Columbia  
Crawford  
Cumberland  
Dauphin  
Delaware  
Elk  
Erie  
Fayette  
Forest  
Franklin  
Fulton  
Greene  
Huntingdon  
Indiana  
Jefferson  
Juniata  
Lackawanna  
Lancaster  
Lawrence  
Lebanon  
Lehigh  
Luzerne

Lycoming  
McKean  
Mercer  
Mifflin  
Monroe  
Montgomery  
Montour  
Northampton  
Northumberland  
Perry  
Philadelphia  
Pike  
Potter  
Schuylkill  
Snyder  
Somerset  
Sullivan  
Susquehanna  
Tioga  
Union  
Venango  
Warren  
Washington  
Wayne  
Westmoreland  
Wyoming  
York

#### **Explanatory Comment—1994**

These new rules provide an optional procedure for using hearing officers in partial custody and visitation cases. The procedure is similar to the one provided for support cases in Rule 1910.12: a conference, record hearing before a hearing officer and argument on exceptions before a judge. The terms “conference officer” and “hearing officer” have the same meaning here as in the support rules.

It is important to note that use of the procedure prescribed in Rules 1915.4-1 and 1915.4-2 is optional rather than mandatory. Counties which prefer to have all partial custody and visitation cases heard by a judge may continue to do so.

These procedures are not intended to replace or prohibit the use of any form of mediation or conciliation. On the contrary, they are intended to be used in cases which are not resolved through the use of less adversarial means.

### **Explanatory Comment—2007**

The intent of the amendments to Rules 1915.4-1 and 1915.4-2, and new Rule 1915-4.3, is to clarify the procedures in record and non-record custody proceedings. When the first proceeding is non-record, no exceptions are required and a request for a de novo hearing may be made.

### **Source**

The provisions of this Rule 1915.4-1 adopted July 15, 1994, effective January 1, 1995, 24 Pa.B. 3803; amended November 30, 2000, effective March 1, 2001, 30 Pa.B. 6423; amended October 30, 2007, effective immediately, 37 Pa.B. 5974. Immediately preceding text appears at serial page (322436).

### **Rule 1915.4-2. Partial Custody. Visitation. Office Conference. Hearing. Record. Exceptions. Order.**

#### *(a) Office Conference.*

- (1) The office conference shall be conducted by a conference officer.
- (2) If the respondent fails to appear at the conference before the conference officer as directed by the court, the conference may proceed without the respondent.
- (3) The conference officer may make a recommendation to the parties relating to partial custody or visitation of the child or children. If an agreement for partial custody or visitation is reached at the conference, the conference officer shall prepare a written order in conformity with the agreement for signature by the parties and submission to the court together with the officer's recommendation for approval or disapproval. The court may enter an order in accordance with the agreement without hearing the parties.
- (4) At the conclusion of the conference, if an agreement relating to partial custody or visitation has not been reached, the parties shall be given notice of the date, time and place of a hearing before a hearing officer, which may be the same day, but in no event shall be more than forty-five days from the date of the conference.

#### *(b) Hearing.*

- (1) The hearing shall be conducted by a hearing officer who must be a lawyer, and a record shall be made of the testimony. A hearing officer who is a lawyer employed by a judicial district shall not practice family law before a conference officer, hearing officer or permanent or standing master employed by the same judicial district.



(2) The hearing officer shall receive evidence and hear argument. The hearing officer may recommend to the court that the parties and/or the subject child or children submit to examination and evaluation by experts pursuant to Rule 1915.8.

(3) Within ten days of the conclusion of the hearing, the hearing officer shall file with the court and serve upon all parties a report containing a recommendation with respect to the entry of an order of partial custody or visitation. The report may be in narrative form stating the reasons for the recommendation and shall include a proposed order, including a specific schedule for partial custody or visitation.

(4) Within twenty days after the date the hearing officer's report is mailed or received by the parties, whichever occurs first, any party may file exceptions to the report or any part thereof, to rulings on objections to evidence, to statements or findings of fact, to conclusions of law, or to any other matters occurring during the hearing. Each exception shall set forth a separate objection precisely and without discussion. Matters not covered by exceptions are deemed waived unless, prior to entry of the final order, leave is granted to file exceptions raising those matters. If exceptions are filed, any other party may file exceptions within twenty days of the date of service of the original exceptions.

(5) If no exceptions are filed within the twenty-day period, the court shall review the report and, if approved, enter a final order.

(6) If exceptions are filed, the court shall hear argument on the exceptions within forty-five days of the date the last party files exceptions, and enter an appropriate final order within fifteen days of argument. No motion for Post-Trial Relief may be filed to the final order.

### **Explanatory Comment—2006**

The time for filing exceptions has been expanded from ten to twenty days. The purpose of this amendment is to provide ample opportunity for litigants and counsel to receive notice of the entry of the order, to assure commonwealth-wide consistency in calculation of time for filing and to conform to applicable general civil procedural rules.

### **Source**

The provisions of this Rule 1915.4-2 adopted July 15, 1994, effective January 1, 1995, 24 Pa.B. 3803; amended November 30, 2000, effective March 1, 2001, 30 Pa.B. 6423; amended August 8, 2006, effective immediately, 36 Pa.B. 4709; amended October 30, 2007, effective immediately, 37 Pa.B. 5974. Immediately preceding text appears at serial pages (322436) to (322438).

### **Rule 1915.4-3. Non-Record Proceedings. Trial.**

(a) *Non-Record Proceedings.* In those jurisdictions which utilize an initial non-record proceeding such as a conciliation conference or office conference, if no agreement is

reached at the conclusion of the proceeding, the conference officer or conciliator shall promptly notify the court that the matter should be listed for trial.

(b) *Trial.* The trial before the court shall be de novo. The court shall hear the case and render a decision within the time periods set forth in Rule 1915.4.

**Rule 1915.5. Question of Jurisdiction or Venue. No Responsive Pleading by Defendant Required. Counterclaim. Discovery.**

(a) A party must raise any question of jurisdiction of the person or venue by preliminary objection filed within twenty days of service of the pleading to which objection is made or at the time of hearing, whichever first occurs. No other pleading shall be required, but if one is filed it shall not delay the hearing.

Official Note

The court may raise at any time a question of (1) jurisdiction over the subject matter of the action or (2) the exercise of its jurisdiction pursuant to Section 5347 of the Domestic Relations Code, relating to simultaneous proceedings in other courts, Section 5348, relating to inconvenient forum, and Sections 5349 and 5364(f), relating to jurisdiction declined by reason of conduct. See 23 Pa.C.S. § § 5347, 5348, 5349 and 5364(f).

The Uniform Child Custody Jurisdiction Act, 23 Pa.C.S. § 5366, provides that, upon request of a party, an action in which a question of the existence or exercise of jurisdiction is raised shall be given calendar priority and handled expeditiously.

(b) A party may file a counterclaim asserting the right of custody, partial custody or visitation within twenty days of service of the complaint upon that party or at the time of hearing, whichever first occurs. The claim shall be in the same form as a complaint as required by Rule 1915.3.

(c) There shall be no discovery unless authorized by special order of court.

Official Note

The rule relating to discovery in domestic relations matters generally is Rule 1930.5.

**Source**

The provisions of this Rule 1915.5 amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943; amended May 5, 1997, effective July 1, 1997, 27 Pa.B. 2532. Immediately preceding text appears at serial pages (202636) to (202637).

**Rule 1915.6. Joinder of Parties.**

(a)(1) If the court learns from the pleadings or any other source that a parent whose parental rights have not been previously terminated or a person who has physical custody of the child is not a party to the action, it shall order that the person be joined as a party. Such person shall be served with a copy of all prior pleadings and notice of the joinder substantially in the form prescribed by Rule 1915.16(a).

(2) The person joined must file any objection to the order of joinder within twenty days after notice of the order.

(3) The person joined may file a counterclaim asserting a right to custody, partial custody or visitation in the form required for a complaint by Rule 1915.3. A copy of the counterclaim shall be served upon all other parties to the action as provided by Rule 440.

(b) If the court learns from the pleadings or any other source that any other person who claims to have custody or visitation rights with respect to the child is not a party to the action, it shall order that notice be given to that person of the pendency of the action and of the right to intervene therein. The notice shall be substantially in the form prescribed by Rule 1915.16(b).

#### Official Note

Subdivision (a) incorporates the provision of the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S. § 5351, requiring a person not a party who has physical custody of the child to be joined as a party and notified of the pendency of the proceeding. Subdivision (a) also extends the requirement of the Uniform Act, 23 Pa.C.S. § 5345, that a parent whose parental rights have not been previously terminated be given notice of the proceeding and an opportunity to be heard by requiring the joinder of such parent. Subdivision (b), in providing for intervention by persons claiming custody or visitation rights, is inconsistent with and therefore suspends the Uniform Act, 23 Pa.C.S. § 5351, insofar as the Act requires the joinder of such persons.

#### Source

The provisions of this Rule 1915.6 amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943. Immediately preceding text appears at serial pages (134345) to (134346).

#### **Rule 1915.7. Consent Order.**

If an agreement for custody, partial custody or visitation is reached and the parties desire a consent order to be entered, they shall note their agreement upon the record or shall submit to the court a proposed order bearing the written consent of the parties or their counsel.

#### Source

The provisions of this Rule 1915.7 amended November 8, 1982, effective January 1, 1983, 12 Pa.B. 4040. Immediately preceding text appears at serial page (72639).

**Rule 1915.8. Physical and Mental Examination of Persons.**

(a) The court may order the child(ren) and/or any party to submit to and fully participate in an evaluation by an appropriate expert or experts. The order, which shall be substantially in the form set forth in Rule 1915.18, may be made upon the court's own motion, upon the motion of a party with reasonable notice to the person to be examined, or by agreement of the parties. The order shall specify the place, manner, conditions and scope of the examination and the person or persons by whom it shall be made and to whom distributed. In entering an order directing an evaluation pursuant to this rule, the court shall consider all appropriate factors including the following, if applicable:

(1) the allocation of the costs, including insurance coverage, if any, attendant to the undertaking of the evaluation and preparation of the resultant report and court testimony of any appointed expert;

(2) the execution of appropriate authorizations and/or consents to facilitate the examination;

(3) any deadlines imposed regarding the completion of the examination and payment of costs;

(4) the production of any report and of underlying data to counsel and/or any unrepresented party upon the completion of the examination; and

(5) any additional safeguards that are deemed appropriate as a result of the alleged presence of domestic violence and/or child abuse.

(b) Unless otherwise directed by the court, the expert shall deliver to the court, to the attorneys of record and to any unrepresented party, copies of any reports arising from the evaluation setting out the findings, results of all tests made, diagnosis and conclusions. No reports shall be filed of record or considered evidence unless and until admitted by the court. Any report which is prepared at the request of a party, with or without a court order, and which a party intends to introduce at trial, must be delivered to the court and the other party at least thirty days before trial. If the report or any information from the evaluator is provided to the court, the evaluator shall be subject to cross-examination by all counsel and any unrepresented party without regard to who obtains or pays for the evaluation.

(c) If a party refuses to obey an order of court made under subdivision (a) of this rule, the court may make an order refusing to allow the disobedient party to support or oppose designated claims or defenses, prohibiting the party from introducing in evidence designated documents, things or testimony, prohibiting the party from introducing evidence of physical or mental condition, or making such other order as is just. The

willful failure or refusal of a party to comply with an order entered pursuant to this rule may also give rise to a finding of contempt and the imposition of such sanctions as may be deemed appropriate by the court, including, but not limited to, an adverse inference against the non-complying party.

(d) A petition for contempt alleging failure to comply with an order entered pursuant to subdivision (a) of this rule shall be treated in an expedited manner.

### **Explanatory Comment—2007**

This rule addresses the process for any number of expert evaluations a court may order in a custody case, including, but not limited to, physical, mental health, custody and/or drug and alcohol evaluations, and/or home studies. Since the initial promulgation of this rule in 1981, the frequency of utilizing professionals as expert witnesses in child custody litigation has increased considerably. In appropriate cases, evaluations have served as a means to provide the court with a full and complete record and to facilitate settlement of the litigation.

The proposed revisions to Rule 1915.8 are intended to afford the trial court and the parties a more flexible and case-sensitive means of determining the scope and parameters of a physical and/or mental examination, including deadlines, costs, underlying data, and access. In many instances, the previous sixty-day deadline was impractical and ignored. While some cases demanded that the evaluation be completed in less than 60 days, others demanded far more time than that. The revisions to this rule also specifically permit the trial court to draw an adverse inference from one party's failure to comply with an order pursuant to this rule.

### **Source**

The provisions of this Rule 1915.8 amended May 16, 1994, effective July 1, 1994, 24 Pa.B. 2882; amended May 23, 2007, effective August 1, 2007, 37 Pa.B. 2602. Immediately preceding text appears at serial pages (231372) and (303579).

### **Rule 1915.9. No Default Judgment.**

No judgment may be entered by default or on the pleadings.

### **Rule 1915.10. Decision.**

(a) The court may make the decision before the testimony has been transcribed.

(b) No motion for post-trial relief may be filed to an order of custody, partial custody or visitation.

Official Note

See 23 Pa.C.S. § 5301 et seq. for provisions relating to the award of sole or shared custody (§ § 5303, 5304), counseling and the temporary award of custody pending counseling (§ 5305), submission of a plan to implement a custody order (§ 5306), removal of a party or child from the Commonwealth (§ 5308), access to records of the child (§ 5309), and modification of existing custody orders (§ 5310).

The statute also provides that the court shall state on the record its reasons when it declines to enter an award of custody as agreed to by the parents or under the plan developed by them (23 Pa.C.S. § 5307).

#### **Source**

The provisions of this Rule 1915.10 amended October 19, 1983, effective January 1, 1984, 13 Pa.B. 3629; amended November 7, 1988, effective January 1, 1989, 18 Pa.B. 5323. Immediately preceding text appears at serial page (85746).

#### **Rule 1915.11. Appointment of Attorney for Child. Interrogation of Child. Attendance of Child at Hearing or Conference.**

(a) The court may on its own motion or the motion of a party appoint an attorney to represent the child in the action. The court may assess the cost upon the parties or any of them or as otherwise provided by law.

(b) The court may interrogate a child, whether or not the subject of the action, in open court or in chambers. The interrogation shall be conducted in the presence of the attorneys and, if permitted by the court, the parties. The attorneys shall have the right to interrogate the child under the supervision of the court. The interrogation shall be part of the record.

(c) Unless otherwise directed by the court, the child who is the subject of the action shall not be required to attend a hearing before the court or a conference.

#### **Official Note**

A party may bring a child to a conference or hearing but, in the absence of an order of court, is not required to do so.

#### **Source**

The provisions of this Rule 1915.11 amended April 29, 1991, effective July 1, 1991, 21 Pa.B. 2337. Immediately preceding text appears at serial pages (134347) to (134348).

#### **Rule 1915.12. Civil Contempt for Disobedience of Custody Order. Petition. Form of Petition. Service. Order.**

(a) A petition for civil contempt shall begin with a notice and order to appear in substantially the following form:

### NOTICE AND ORDER TO APPEAR

Legal proceedings have been brought against you alleging you have willfully disobeyed an order of court for (custody) (partial custody) (visitation).

If you wish to defend against the claim set forth in the following pages, you may but are not required to file in writing with the court your defenses or objections. Whether or not you file in writing with the court your defenses or objections, you must appear in person in court on \_\_\_\_\_, at \_\_\_\_M., (Day and Date) (Time) in Courtroom \_\_\_\_\_,

\_\_\_\_\_  
(Address)

IF YOU DO NOT APPEAR IN PERSON, THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST.

If the court finds that you have willfully failed to comply with its order for (custody) (partial custody) (visitation), you may be found to be in contempt of court and committed to jail, fined or both.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Telephone Number)

BY THE COURT:

\_\_\_\_\_  
J.

Date: \_\_\_\_\_

(b) The petition shall allege the facts which constitute wilful failure to comply with the custody, partial custody or visitation order, a copy of which shall be attached to the petition.

(c) The petition shall be in substantially the following form:

(Caption)

PETITION FOR CIVIL CONTEMPT FOR  
DISOBEDIENCE OF (CUSTODY) (PARTIAL CUSTODY)  
(VISITATION) ORDER

The Petition of \_\_\_\_\_, respectfully represents:

1. That on \_\_\_\_\_, Judge \_\_\_\_\_ entered an Order awarding (Petitioner) (Respondent) (custody) (partial custody) (visitation) of the minor child(ren) \_\_\_\_\_.  
(Name(s) of Child(ren))

A true and correct copy of the order is attached to this petition.

2. Respondent has willfully failed to abide by the order in that

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

WHEREFORE, Petitioner requests that Respondent be held in contempt of court.

\_\_\_\_\_  
(Attorney for Petitioner) (Petitioner)

I verify that the statements made in this complaint are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Petitioner

(d) The petition shall be served upon the respondent by personal service or regular mail. No answer to the petition shall be required. If service is by mail, the hearing on the petition shall not be held sooner than seven days after mailing of the petition unless the



court for cause shown orders an earlier hearing. If the respondent fails to appear, the court shall continue the hearing and may order personal service by the sheriff or constable, or alternative service as accepted by the court, of the petition and notice of a new hearing date or the court may issue a bench warrant for production of the respondent in court and not for imprisonment.

(e) After hearing, an order committing a respondent to jail for contempt of a custody, partial custody or visitation order shall specify the condition which must be fulfilled to obtain release of the respondent.

#### Official Note

See 23 Pa.C.S. § 4346 relating to contempt for noncompliance with visitation or partial custody order.

See Section 5356 of the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S. § 5356, relating to filing and enforcement of custody decrees of another state, and Section 5364(a), 23 Pa.C.S. § 5364(a), relating to intrastate application of the Uniform Act.

#### Source

The provisions of this Rule 1915.12 amended November 8, 1982, effective January 1, 1983, 12 Pa.B. 4040; amended November 7, 1988, effective January 1, 1989, 18 Pa.B. 5323; amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943; amended December 2, 1994, effective March 1, 1995, 24 Pa.B. 6263; amended March 18, 2004, effective June 16, 2004, 34 Pa.B. 1754. Immediately preceding text appears at serial pages (202640) to (202642).

#### **Rule 1915.13. Special Relief.**

At any time after commencement of the action, the court may on application or its own motion grant appropriate interim or special relief. The relief may include but is not limited to the award of temporary custody, partial custody or visitation; the issuance of appropriate process directing that a child or a party or person having physical custody of a child be brought before the court; and a direction that a person post security to appear with the child when directed by the court or to comply with any order of the court.

#### Official Note

This rule supplies relief formerly available by habeas corpus for production of the child.

#### **Rule 1915.14. Disobedience of Order. Arrest. Contempt.**

If a person disobeys an order of court other than a custody, partial custody or visitation order, the court may issue a bench warrant for the arrest of the person and if the disobedience is wilful may, after hearing, adjudge the person to be in contempt.

Official Note

For disobedience of a custody, partial custody or visitation order, see Rule 1915.12.

**Rule 1915.15. Form of Complaint. Caption. Order. Petition to Modify a Partial Custody or Visitation Order.**

(a) The complaint in an action for custody, partial custody or visitation shall be in substantially the following form:

(Caption)

COMPLAINT FOR (CUSTODY) (PARTIAL CUSTODY) (VISITATION)

1. The plaintiff is \_\_\_\_\_, residing at

\_\_\_\_\_  
(Street) (City) (Zip Code) (County)

2. The defendant is \_\_\_\_\_, residing at

\_\_\_\_\_  
(Street) (City) (Zip Code) (County)

3. Plaintiff seeks (custody) (partial custody) (visitation) of the following child(ren):

Name	Present Residence	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

The child (was) (was not) born out of wedlock.

The child is presently in the custody of \_\_\_\_\_, who resides at \_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Street) (City) (State)

During the past five years, the child has resided with the following persons and at the following addresses:

(List All Persons)	(List All Addresses)	(Dates)
_____	_____	_____
_____	_____	_____
_____	_____	_____

The mother of the child is \_\_\_\_\_, currently residing at \_\_\_\_\_.

She is (married) (divorced) (single).

The father of the child is \_\_\_\_\_, currently residing at \_\_\_\_\_.

He is (married) (divorced) (single).

4. The relationship of plaintiff to the child is that of \_\_\_\_\_..

The plaintiff currently resides with the following persons: \_\_\_\_\_

Name

\_\_\_\_\_

Relationship

5. The relationship of defendant to the child is that of \_\_\_\_\_.

The defendant currently resides with the following persons: \_\_\_\_\_

Name

\_\_\_\_\_

Relationship

6. Plaintiff (has) (has not) participated as a party or witness, or in another capacity, in other litigation concerning the custody of the child in this or another court. The court, term and number, and its relationship to this action is: \_\_\_\_\_.

Plaintiff (has) (has no) information of a custody proceeding concerning the child pending in a court of this Commonwealth or any other state. The court, term and number, and its relationship to this action is: \_\_\_\_\_.

Plaintiff (knows) (does not know) of a person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child. The name and address of such person is: \_\_\_\_\_.

7. The best interest and permanent welfare of the child will be served by granting the relief requested because (set forth facts showing that the granting of the relief requested will be in the best interest and permanent welfare of the child): \_\_\_\_\_.

8. Each parent whose parental rights to the child have not been terminated and the person who has physical custody of the child have been named as parties to this action. All other persons, named below, who are known to have or claim a right to custody or visitation of the child will be given notice of the pendency of this action and the right to intervene:

Name      Address      Basis of Claim

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Wherefore, plaintiff requests the court to grant (custody) (partial custody) (visitation) of the child.

\_\_\_\_\_  
Attorney for Plaintiff

I verify that the statements made in this Complaint are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

\_\_\_\_\_  
Plaintiff

Official Note

The form of complaint is appropriate where there is one plaintiff and one defendant and where the custody of one child is sought, or where the custody of several children is sought and the information required by paragraphs 3 to 7 is identical for all of the children. Where there are multiple parties, the complaint should be appropriately adapted to accommodate them. Where the custody of several children is sought and the information required is not identical for all, the complaint should contain a separate paragraph for each child.

(b) A petition to modify a partial custody or visitation order shall be in substantially the following form:

**(Caption)**  
**PETITION FOR MODIFICATION OF A PARTIAL**  
**CUSTODY OR VISITATION ORDER**

1. The petition of \_\_\_\_\_ respectfully represents that on \_\_\_\_\_, 19\_\_ an Order of Court was entered for (PARTIAL CUSTODY) (VISITATION), a true and correct copy of which is attached.

2. This Order should be modified because:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

WHEREFORE, Petitioner requests that the Court modify the existing Order for (PARTIAL CUSTODY) (VISITATION) because it will be in the best interest of the child(ren).

\_\_\_\_\_  
(Attorney for Petitioner) (Petitioner)

I verify that the statements made in this complaint are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Petitioner

(c) The order to be attached at the front of the complaint or petition for modification shall be in substantially the following form:

(Caption)

ORDER OF COURT

You, \_\_\_\_\_, (defendant) (respondent), have been sued in court to (OBTAIN) (MODIFY) custody, partial custody or visitation of the child(ren):

You are ordered to appear in person at \_\_\_\_\_, (Address)

on \_\_\_\_\_, at \_\_\_\_\_ .M., for (Day and Date) (Time)

- a conciliation or mediation conference.
- a pretrial conference.
- a hearing before the court.

If you fail to appear as provided by this order, an order for custody, partial custody or visitation may be entered against you or the court may issue a warrant for your arrest.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

---

(Name)

---

(Address)

---

(Telephone Number)

AMERICANS WITH DISABILITIES ACT OF 1990

The Court of Common Pleas of \_\_\_\_\_ County is required by law to comply with the Americans with Disabilities Act of 1990. For information about accessible facilities and reasonable accommodations available to disabled individuals having business before the court, please contact our office. All arrangements must be made at least 72 hours prior to any hearing or business before the court. You must attend the scheduled conference or hearing.

BY THE COURT:

---

J.  
Date: \_\_\_\_\_

Source

The provisions of this Rule 1915.15 amended November 8, 1982, effective January 1, 1983, 12 Pa.B. 4040; amended April 29, 1991, effective July 1, 1991, 21 Pa.B. 2337; amended December 2, 1994, effective March 1, 1995, 24 Pa.B. 6263; amended March 2, 2000, effective immediately, 30 Pa.B. 1646; amended March 18, 2004, effective June 16, 2004, 34 Pa.B. 1754. Immediately preceding text appears at serial pages (202642), (265467) to (265469).

**Rule 1915.16. Form of Order and Notice. Joinder. Intervention.**

(a) The order and notice joining a party in an action under Rule 1915.6(a) shall be substantially in the following form:

(Caption)

**ORDER AND NOTICE**

A complaint has been filed in the Court of Common Pleas of \_\_\_\_\_

County concerning custody, partial custody and visitation of the following child(ren):

\_\_\_\_\_  
\_\_\_\_\_

The Court has learned you may have a legal interest in custody, partial custody or visitation of the child(ren) named.

A hearing will be held in Courtroom \_\_\_\_\_ of the Court of Common Pleas,

\_\_\_\_\_  
(Address)

on \_\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_ .M. If you wish to have custody,

(Day and Date) (Time)

partial custody or visitation of the child(ren) or wish to present evidence to the Court on those matters, you should appear at the place and time and on the date above.

If you have the child(ren) in your possession or control, you must appear and bring them to the Courthouse with you.

If you wish to claim the right to custody, partial custody or visitation, you may file a counterclaim.

If you fail to appear as provided by this order or to bring the child(ren), an order for custody, partial custody or visitation may be entered against you or the Court may issue a warrant for your arrest.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.**

**IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.**

\_\_\_\_\_

(Name)

---

(Address)

---

(Telephone Number)

AMERICANS WITH DISABILITIES ACT OF 1990

The Court of Common Pleas of \_\_\_\_\_ County is required by law to comply with the Americans with Disabilities Act of 1990. For information about accessible facilities and reasonable accommodations available to disabled individuals having business before the court, please contact our office. All arrangements must be made at least 72 hours prior to any hearing or business before the court.  
BY THE COURT:

---

J.

Date: \_\_\_\_\_

(b) The order for notice of the pendency of the action and the right to intervene required by Rule 1915.6(b) shall be substantially in the following form:

(Caption)  
ORDER AND NOTICE

A complaint has been filed in the Court of Common Pleas of

---

County concerning custody, partial custody and visitation of the following child(ren):

---

The Court has learned you claim custody, partial custody or visitation rights with respect to the child(ren) named.

A hearing will be held in Courtroom \_\_\_\_\_ of the Court of Common Pleas,

(Address)

on \_\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_M. If you wish to have custody,

(Day and Date) (Time)

If you wish to assert your claim to custody, partial custody or visitation rights with respect to the child(ren) or wish to present evidence to the Court on those matters, you should petition the Court, on or before the above date, for leave to intervene in the proceedings.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

---

(Name)

---

(Address)

---

(Telephone Number)

AMERICANS WITH DISABILITIES ACT OF 1990

The Court of Common Pleas of

\_\_\_\_\_ County is required by law to comply with the Americans with Disabilities Act of 1990. For information about accessible facilities and reasonable accommodations available to disabled individuals having business before the court, please contact our office. All arrangements must be made at least 72 hours prior to any hearing or business before the court.

BY THE COURT:

---

J.

Date: \_\_\_\_\_

#### Source

The provisions of this Rule 1915.16 amended December 2, 1994, effective March 1, 1995, 24 Pa.B. 6263; amended March 18, 2004, effectively June 16, 2004, 34 Pa.B. 1754. Immediately preceding text appears at serial pages (265469) to (265470) and (202647).

#### **Rule 1915.18. Form of Order Directing Expert Examination and Report.**

The order of court directing expert evaluation in a custody matter pursuant to Rule 1915.8 shall be in substantially the following form:

#### **(Caption) ORDER OF COURT**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, it is hereby ORDERED, that:

1. The evaluator  shall be \_\_\_\_\_ or  will be selected by the parties.

2. The evaluator shall conduct a

Physical Evaluation

Psychological Evaluation

Custody Evaluation

Drug and/or Alcohol Evaluation

Home Study



Other (Specify) \_\_\_\_\_

3. The evaluator  shall  shall not make specific recommendations for legal and physical custody. If the evaluator makes specific recommendations, the evaluator shall state the specific reasons for the recommendations.

4. The parties shall participate fully with the evaluator on a timely basis, including retaining the evaluator upon appropriate terms, scheduling appointments, paying promptly, participating in all sessions and in appropriate testing recommended by the evaluator and executing any reasonable consents relating to themselves and their children.

5. Both parties shall promptly cooperate to maximize the use of available insurance coverage, if any, and to notify the other party of the result. The  plaintiff  defendant shall submit the costs to his or her insurance first. The cost of the unreimbursed portion of the evaluation shall preliminarily be allocated between the parties with the plaintiff paying \_\_\_ % and the defendant paying \_\_\_ % without prejudice to the ultimate apportionment of such costs by subsequent agreement of the parties or order of court.

6. The cost of the evaluation shall be borne by the county, subject to reimbursement by \_\_\_\_\_.

7. The cost for the evaluator's time for depositions and/or testimony for hearing shall be  allocated \_\_\_ % to the plaintiff and \_\_\_ % to the defendant or  paid by the party seeking the testimony.

8. The evaluator may consult with and/or interview any person the evaluator reasonably believes can provide relevant information, including other experts and/or fact witnesses.

9. The evaluator may utilize the services of another qualified professional (e.g. to perform additional services) without court approval.

10. Subject to the applicable rules of evidence, the evaluator's file (including notes, exhibits, correspondence, test interpretations and, to the extent it is not a violation of copyright law or applicable professional rules, raw test data) shall promptly be made available to counsel for the parties.

11. Provided that the parties cooperate on a timely basis, the evaluator shall deliver his or her report to counsel for the parties, any unrepresented party, the guardian *ad litem*, if any, and to the court at least \_\_\_ days prior to the first day of trial. The report shall not be filed of record.

12. Prior to and/or subsequent to the submission of the evaluator's written report, counsel for the parties shall not be permitted to communicate with the evaluator as to substantive issues, without the consent or direct participation of counsel for the other party.

13. If the report or any information from the evaluator is provided to the court, the evaluator shall be subject to cross examination by all counsel and any unrepresented party regardless of who obtains or pays for the services of the evaluator.

14. The evaluator shall be provided with a copy of this order.

15. The evaluator's report shall not be inappropriately disseminated.

16. Other provisions:

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FAILURE TO COMPLY WITH THE TERMS OF THIS ORDER MAY RESULT IN FINES,  
IMPRISONMENT OR OTHER SANCTIONS.

BY THE COURT:

\_\_\_\_\_  
J.

### Source

The provisions of this Rule 1915.18 adopted May 16, 1994, effective July 1, 1994, 24 Pa.B. 2882; amended May 23, 2007, effective August 1, 2007, 37 Pa.B. 2602. Immediately preceding text appears at serial pages (303585) to (303586).

### **Rule 1915.24. Acts of Assembly Not Suspended.**

The following Acts or parts of Acts of Assembly shall not be deemed suspended or affected:

(1) Chapter 63 of the Judicial Code, 42 Pa.C.S. § 6301 et seq., known as the Juvenile Act;

(2) Section 5341 et seq. of the Domestic Relations Code, 23 Pa.C.S. § 5341 et seq., known as the Uniform Child Custody Jurisdiction Act, except to the extent suspended by Rule 1915.25 governing Suspension of Acts of Assembly;

(3) The Act of December 19, 1990, No. 206, 23 Pa.C.S. § 6301 et seq., known as the Child Protective Services Law;

(4) The Act of October 7, 1976, No. 218, as amended, 23 Pa.C.S. § 6101 et seq., known as the Protection from Abuse Act; and

(5) Chapter 53, Subchapter A of Title 23 of the *Consolidated Statutes*, 23 Pa.C.S. § 5301 et seq., setting forth general custody provisions.

### Source

The provisions of this Rule 1915.24 amended November 8, 1982, effective January 1, 1983, 12 Pa.B. 4040; amended November 7, 1988, effective January 1, 1989, 18 Pa.B. 5323; amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943. Immediately preceding text appears at serial pages (157279) to (157280).

**Rule 1915.25. Suspension of Acts of Assembly.**

Section 5351 of the Domestic Relations Code, 23 Pa.C.S. § 5351, of the Uniform Child Custody Jurisdiction Act, relating to additional parties, is suspended insofar as it provides for the joinder of a person not a party who claims to have custody or visitation rights with respect to the child.

Official Note

Rule 1915.6(b) provides that a person not a party who claims to have custody or visitation rights with respect to the child shall be given notice of the pendency of the proceedings and of the right to intervene.

**Source**

The provisions of this Rule 1915.25 amended March 30, 1994, effective July 1, 1994, 24 Pa.B. 1943. Immediately preceding text appears at serial page (157280).

**Appendix F-5: PA Uniform Child Custody Jurisdiction  
and Enforcement Act**

**UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT**  
**23 PA.C.S.A. §§ 5401-5482**

SUBCHAPTER A  
GENERAL PROVISIONS

Section

- 5401. Short title of chapter.
- 5402. Definitions.
- 5403. Proceedings governed by other law.
- 5404. Application to Native American tribes.
- 5405. International application of chapter.
- 5406. Effect of child custody determination.
- 5407. Priority.
- 5408. Notice to persons outside Commonwealth
- 5409. Appearance and limited immunity.
- 5410. Communication between courts.
- 5411. Taking testimony in another state.
- 5412. Cooperation between courts; preservation of records.

§ 5401. Short title of chapter.

This chapter shall be known and may be cited as the Uniform Child Custody Jurisdiction and Enforcement Act.

§ 5402. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Abandoned." Left without provision for reasonable and necessary care or supervision.

"Child." An individual who has not attained 18 years of age.

"Child custody determination." A judgment, decree or other order of a court providing for legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

"Child custody proceeding." A proceeding in which legal custody, physical custody or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental

rights and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation or enforcement under Subchapter C (relating to enforcement).

"Commencement." The filing of the first pleading in a proceeding.

"Court." An entity authorized under the law of a state to establish, enforce or modify a child custody determination.

"Home state." The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child six months of age or younger, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

"Initial determination." The first child custody determination concerning a particular child.

"Issuing court." The court that makes a child custody determination for which enforcement is sought under this chapter.

"Modification." A child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

"Person." An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity.

"Person acting as a parent." A person, other than a parent, who:

(1) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(2) has been awarded legal custody by a court or claims a right to legal custody under the laws of this Commonwealth.

"Physical custody." The physical care and supervision of a child.

"State." A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

"Tribe." A Native American tribe or band, or Alaskan Native village, which is recognized by Federal law or formally acknowledged by a state.

"Warrant." An order issued by a court authorizing law enforcement officers to take physical custody of a child.

§ 5403. Proceedings governed by other law.

This chapter does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

§ 5404. Application to Native American tribes.

(a) Primacy of Indian Child Welfare Act.--A child custody proceeding that pertains to a Native American child as defined in the Indian Child Welfare Act of 1978 (Public Law 95-608, 25 U.S.C. § 1901 et seq.) is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act of 1978.

(b) Tribe treated as state.--A court of this Commonwealth shall treat a tribe as if it were a state of the United States for the purpose of applying Subchapter B (relating to jurisdiction) and this subchapter.

(c) Tribal custody determinations.--A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Subchapter C (relating to enforcement).

§ 5405. International application of chapter.

(a) Foreign country treated as state.--A court of this Commonwealth shall treat a foreign country as if it were a state of the United States for the purpose of applying Subchapter B (relating to jurisdiction) and this subchapter.

(b) Foreign custody determinations.--Except as otherwise provided in subsection (c), a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Subchapter C (relating to enforcement).

(c) Violation of human rights.--A court of this Commonwealth need not apply this chapter if the child custody law of a foreign country violates fundamental principles of human rights.

§ 5406. Effect of child custody determination.

A child custody determination made by a court of this Commonwealth that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this Commonwealth or notified in accordance with section 5408 (relating to notice to persons outside Commonwealth) or who have submitted to the jurisdiction of the court and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

§ 5407. Priority.

If a question of existence or exercise of jurisdiction under this chapter is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

§ 5408. Notice to persons outside Commonwealth.

(a) General rule.--Notice required for the exercise of jurisdiction when a person is outside this Commonwealth may be given in a manner prescribed by the laws of this Commonwealth for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(b) Proof of service.--Proof of service may be made in the manner prescribed by the laws of this Commonwealth or by the law of the state in which the service is made.

(c) Submission to jurisdiction.--Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

§ 5409. Appearance and limited immunity.

(a) General rule.--A party to a child custody proceeding, including a modification proceeding or a petitioner or respondent in a proceeding to enforce or register a child custody determination, is not subject to personal jurisdiction in this Commonwealth for another proceeding or purpose solely by reason of having participated or of having been physically present for the purpose of participating in the proceeding.

(b) Service.--A person who is subject to personal jurisdiction in this Commonwealth on a basis other than physical presence is not immune from service of process in this Commonwealth. A party present in this Commonwealth who is subject to the jurisdiction



of another state is not immune from service of process allowable under the laws of that state.

(c) Acts committed while in this Commonwealth.--The immunity granted by subsection (a) does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this chapter committed by an individual while present in this Commonwealth.

#### § 5410. Communication between courts.

(a) General rule.--A court of this Commonwealth may communicate with a court in another state concerning a proceeding arising under this chapter.

(b) Participation of parties.--The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Matters of cooperation between courts.--Communication between courts on schedules, calendars, court records and similar matters may occur without informing the parties. A record need not be made of the communication.

(d) Record.--Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(e) Definition.--As used in this section, the term "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

#### § 5411. Taking testimony in another state.

(a) General rule.--In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this Commonwealth for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) Means and location.--A court of this Commonwealth may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means or other electronic means before a designated court or at another location in that state. A

court of this Commonwealth shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Transmission of documentary evidence.--Documentary evidence transmitted from another state to a court of this Commonwealth by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

§ 5412. Cooperation between courts; preservation of records.

(a) Assistance of another state.--A court of this Commonwealth may request the appropriate court of another state to:

- (1) hold an evidentiary hearing;
- (2) order a person to produce or give evidence pursuant to procedures of that state;
- (3) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
- (4) forward to the court of this Commonwealth a certified copy of the transcript of the record of the hearing, the evidence otherwise presented and any evaluation prepared in compliance with the request; and
- (5) order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) Assistance to another state.--Upon request of a court of another state, a court of this Commonwealth may hold a hearing, enter an order or forward transcripts, evidence and evaluations described in subsection (a).

(c) Expenses.--Travel and other necessary and reasonable expenses incurred under subsections (a) and (b) may be assessed against the parties according to the laws of this Commonwealth.

(d) Preservation of records.--A court of this Commonwealth shall preserve the pleadings, orders, decrees, records of hearings, evaluations and other pertinent records with respect to a child custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records.

SUBCHAPTER B  
JURISDICTION

Section:

- 5421. Initial child custody jurisdiction.
- 5422. Exclusive, continuing jurisdiction.
- 5423. Jurisdiction to modify determination.
- 5424. Temporary emergency jurisdiction.
- 5425. Notice; opportunity to be heard; joinder.
- 5426. Simultaneous proceedings.
- 5427. Inconvenient forum.
- 5428. Jurisdiction declined by reason of conduct.
- 5429. Information to be submitted to court.
- 5430 Appearance of parties and child.

§ 5421. Initial child custody jurisdiction.

(a) General rule.--Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth has jurisdiction to make an initial child custody determination only if:

(1) this Commonwealth is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this Commonwealth but a parent or person acting as a parent continues to live in this Commonwealth;

(2) a court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this Commonwealth is the more appropriate forum under section 5427 (relating to inconvenient forum) or 5428 (relating to jurisdiction declined by reason of conduct), and:

(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this Commonwealth other than mere physical presence; and

(ii) substantial evidence is available in this Commonwealth concerning the child's care, protection, training and personal relationships;

(3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this Commonwealth is the more appropriate forum to determine the custody of the child under section 5427 or 5428; or

(4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2) or (3).

(b) Exclusive jurisdictional basis.--Subsection (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this Commonwealth.

(c) Physical presence and personal jurisdiction unnecessary.--Physical presence of or personal jurisdiction over a party or a child is not necessary or sufficient to make a child custody determination.

§ 5422. Exclusive, continuing jurisdiction.

(a) General rule.--Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth which has made a child custody determination consistent with section 5421 (relating to initial child custody jurisdiction) or section 5423 (relating to jurisdiction to modify determination) has exclusive, continuing jurisdiction over the determination until:

(1) a court of this Commonwealth determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this Commonwealth and that substantial evidence is no longer available in this Commonwealth concerning the child's care, protection, training and personal relationships; or

(2) a court of this Commonwealth or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this Commonwealth.

(b) Modification where court does not have exclusive, continuing jurisdiction.--A court of this Commonwealth which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under section 5421.

§ 5423. Jurisdiction to modify determination.

Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth may not modify a child custody determination made by a court of another state unless a court of this Commonwealth has jurisdiction to make an initial determination under section 5421(a)(1) or (2) (relating to initial child custody jurisdiction) and:

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under section 5422 (relating to exclusive, continuing jurisdiction) or that a court of this Commonwealth would be a more convenient forum under section 5427 (relating to inconvenient forum); or

(2) a court of this Commonwealth or a court of the other state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state.

§ 5424. Temporary emergency jurisdiction.

(a) General rule.--A court of this Commonwealth has 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.

(b) No previous custody determination or proceeding.--If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under sections 5421 (relating to initial child custody jurisdiction) through 5423 (relating to jurisdiction to modify determination), a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under sections 5421 through 5423. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under sections 5421 through 5423, a child custody determination made under this section becomes a final determination if it so provides and this Commonwealth becomes the home state of the child.

(c) Previous custody determination or proceeding.--If there is a previous child custody determination that is entitled to be enforced under this chapter or a child custody proceeding has been commenced in a court of a state having jurisdiction under sections 5421 through 5423, any order issued by a court of this Commonwealth under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections 5421 through 5423. The order issued in this Commonwealth remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) Mandatory communication between courts.--A court of this Commonwealth which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of a state having jurisdiction under sections 5421 through 5423, shall immediately communicate with the other court. A court of this Commonwealth which is exercising jurisdiction pursuant to sections 5421 through 5423, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of another state under a statute similar to this section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child and determine a period for the duration of the temporary order.

§ 5425. Notice; opportunity to be heard; joinder.

(a) General rule.--Before a child custody determination is made under this chapter, notice and an opportunity to be heard in accordance with the standards of section 5408 (relating to notice to persons outside Commonwealth) must be given to all persons entitled to notice under the laws of this Commonwealth as in child custody proceedings between residents of this Commonwealth, any parent whose parental rights have not been previously terminated and any person having physical custody of the child.

(b) Lack of notice or opportunity to be heard.--This chapter does not govern the enforceability of a child custody determination made without notice or any opportunity to be heard.

(c) Joinder and intervention.--The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter are governed by the laws of this Commonwealth as in child custody proceedings between residents of this Commonwealth.

§ 5426. Simultaneous proceedings.

(a) General rule.--Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth may not exercise its jurisdiction under this subchapter if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this Commonwealth is a more convenient forum under section 5427 (relating to inconvenient forum).

(b) Stay; communication with other court.--Except as otherwise provided in section 5424, a court of this Commonwealth, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to section 5429 (relating to information to be submitted to court). If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this Commonwealth shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this Commonwealth is a more appropriate forum, the court of this Commonwealth shall dismiss the proceeding.

(c) Modification.--In a proceeding to modify a child custody determination, a court of this Commonwealth shall determine whether a proceeding to enforce the determination

has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

- (1) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying or dismissing the proceeding for enforcement;
- (2) enjoin the parties from continuing with the proceeding for enforcement; or
- (3) proceed with the modification under conditions it considers appropriate.

§ 5427. Inconvenient forum.

(a) General rule.--A court of this Commonwealth which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.

(b) Factors.--Before determining whether it is an inconvenient forum, a court of this Commonwealth shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) the length of time the child has resided outside this Commonwealth;
- (3) the distance between the court in this Commonwealth and the court in the state that would assume jurisdiction;
- (4) the relative financial circumstances of the parties;
- (5) any agreement of the parties as to which state should assume jurisdiction;
- (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

(c) Stay.--If a court of this Commonwealth determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) Jurisdiction declined.--A court of this Commonwealth may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

§ 5428. Jurisdiction declined by reason of conduct.

(a) General rule.--Except as otherwise provided in section (relating to temporary emergency jurisdiction) or by other laws of this Commonwealth, if a court of this Commonwealth has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) a court of the state otherwise having jurisdiction under sections 5421 (relating to initial child custody jurisdiction) through 5423 (relating to jurisdiction to modify determination) determines that this Commonwealth is a more appropriate forum under section 5427 (relating to inconvenient forum); or

(3) no court of any other state would have jurisdiction under the criteria specified in sections 5421 through 5423.

(b) Jurisdiction declined; remedy.--If a court of this Commonwealth declines to exercise its jurisdiction pursuant to subsection (a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under sections 5421 through 5423.

(c) Jurisdiction declined, expenses.--If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (a), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses and child care during the course of the proceedings unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs or expenses against this Commonwealth unless authorized by law other than this chapter.

§ 5429. Information to be submitted to court.

(a) General rule.--Subject to the rules set forth in Chapter (relating to child custody) providing for the confidentiality of procedures, addresses and other identifying information in a child custody proceeding, each party in its first pleading or in an attached affidavit shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:



(1) has participated as a party or witness or in any other capacity in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number and the date of the child custody determination, if any;

(2) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions, and, if so, identify the court, the case number and the nature of the proceeding; and

(3) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of or visitation with the child and, if so, the names and addresses of those persons.

(b) Stay.--If the information required by subsection (a) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(c) Additional information.--If the declaration as to any of the items described in subsection (a)(1) through (3) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(d) Duty to disclose other proceedings.--Each party has a continuing duty to inform the court of any proceeding in this Commonwealth or any other state that could affect the current proceeding.

(e) Identifying information.--If a party alleges in an affidavit or a pleading under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety or liberty of the party or child and determines that the disclosure is in the interest of justice.

#### § 5430. Appearance of parties and child.

(a) General rule.--In a child custody proceeding in this Commonwealth, the court may order a party to the proceeding who is in this Commonwealth to appear before the court in person with or without the child. The court may order any person who is in this Commonwealth and who has physical custody or control of the child to appear in person with the child.

(b) Party outside this Commonwealth.--If a party to a child custody proceeding whose presence is desired by the court is outside this Commonwealth, the court may order that a notice given pursuant to section 5408 (relating to notice to persons outside Commonwealth) include a statement directing the party to appear in person with or

without the child and informing the party that failure to appear may result in a decision adverse to the party.

(c) Personal safety.--The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(d) Expenses.--If a party to a child custody proceeding who is outside this Commonwealth is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

## SUBCHAPTER C ENFORCEMENT

### Section

- 5441. Definitions.
- 5442. Enforcement under Hague Convention.
- 5443. Duty to enforce.
- 5444. Temporary visitation.
- 5445. Registration of child custody determination.
- 5446. Enforcement of registered determination.
- 5447. Simultaneous proceedings.
- 5448. Expedited enforcement of child custody determination.
- 5449. Service of petition and order.
- 5450. Hearing and order.
- 5451. Warrant to take physical custody of child.
- 5452. Costs, fees and expenses.
- 5453. Recognition and enforcement.
- 5454. Appeals.
- 5455. Role of prosecutor or public official.
- 5456. Role of law enforcement.
- 5457. Costs and expenses.

### § 5441. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Petitioner." A person who seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

"Respondent." A person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

§ 5442. Enforcement under Hague Convention.

Under this subchapter a court of this Commonwealth may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

§ 5443. Duty to enforce.

(a) General rule.--A court of this Commonwealth shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.

(b) Remedies.--A court of this Commonwealth may utilize any remedy available under other laws of this Commonwealth to enforce a child custody determination made by a court of another state. The remedies provided in this subchapter are cumulative and do not affect the availability of other remedies to enforce a child custody determination.

§ 5444. Temporary visitation.

(a) General rule.--A court of this Commonwealth which does not have jurisdiction to modify a child custody determination may issue a temporary order enforcing:

(1) a visitation schedule made by a court of another state; or

(2) the visitation provisions of a child custody determination of another state that does not provide for a specific visitation schedule.

(b) Time to obtain permanent change in visitation.--If a court of this Commonwealth makes an order under subsection (a)(2), it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in Subchapter B (relating to jurisdiction). The order remains in effect until an order is obtained from the other court or the period expires.

§ 5445. Registration of child custody determination.

(a) General rule.--A child custody determination issued by a court of another state may be registered in this Commonwealth, with or without a simultaneous request for enforcement, by sending to the appropriate court in this Commonwealth:

- (1) a letter or other document requesting registration;
- (2) two copies, including one certified copy, of the determination sought to be registered and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and
- (3) except as otherwise provided in section 5429 (relating to information to be submitted to court), the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.

(b) Duties of registering court.--On receipt of the documents required by subsection (a), the registering court shall:

- (1) cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and
- (2) serve notice upon the persons named pursuant to subsection (a)(3) and provide them with an opportunity to contest the registration in accordance with this section.

(c) Notice.--The notice required by subsection (b)(2) must state that:

- (1) a registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this Commonwealth;
- (2) a hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and
- (3) failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(d) Contest over validity of registered order.--A person seeking to contest the validity of a registered order must request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

- (1) the issuing court did not have jurisdiction under Subchapter B (relating to jurisdiction);
- (2) the child custody determination sought to be registered has been vacated, stayed or modified by a court having jurisdiction to do so under Subchapter B; or
- (3) the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of section 5408 (relating to notice to persons outside Commonwealth), in the proceedings before the court that issued the order for which registration is sought.

(e) Failure to contest.--If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person  
7 requesting registration and all persons served must be notified of the confirmation.

(f) Res judicata.--Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

§ 5446. Enforcement of registered determination.

(a) General rule.--A court of this Commonwealth may grant any relief normally available under the laws of this Commonwealth to enforce a registered child custody determination made by a court of another state.

(b) Modification.--A court of this Commonwealth shall recognize and enforce, but may not modify, except in accordance with Subchapter B (relating to jurisdiction), a registered child custody determination of a court of another state.

§ 5447. Simultaneous proceedings.

If a proceeding for enforcement under this subchapter is commenced in a court of this Commonwealth and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Subchapter B (relating to jurisdiction), the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

§ 5448. Expedited enforcement of child custody determination.

(a) Verification.--A petition under this subchapter must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(b) Petition.--A petition for enforcement of a child custody determination must state:

- (1) whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;
- (2) whether the determination for which enforcement is sought has been vacated, stayed or modified by a court whose decision must be enforced under this chapter and, if so, identify the court, the case number and the nature of the proceeding;

(3) whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions and, if so, identify the court, the case number and the nature of the proceeding;

(4) the present physical address of the child and the respondent, if known;

(5) whether relief in addition to the immediate physical custody of the child and attorney fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and

(6) if the child custody determination has been registered and confirmed under section 5445 (relating to registration of child custody determination), the date and place of registration.

(c) Hearing.--Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(d) Contest over validity of custody determination.--An order issued under subsection (c) must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs and expenses under section 5452 (relating to costs, fees and expenses) and may schedule a hearing to determine whether further relief is appropriate unless the respondent appears and establishes that:

(1) the child custody determination has not been registered and confirmed under section 5445 and that:

(i) the issuing court did not have jurisdiction under Subchapter B (relating to jurisdiction);

(ii) the child custody determination for which enforcement is sought has been vacated, stayed or modified by a court having jurisdiction to do so under Subchapter B;  
or

(iii) the respondent was entitled to notice, but notice was not given in accordance with the standards of section 5408 (relating to notice to persons outside Commonwealth), in the proceedings before the court that issued the order for which enforcement is sought;  
or

(2) the child custody determination for which enforcement is sought was registered and confirmed under section 5444 (relating to temporary visitation), but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Subchapter B.

§ 5449. Service of petition and order.

Except as otherwise provided in section 5451 (relating to warrant to take physical custody of child), the petition and order must be served by any method authorized by the laws of this Commonwealth upon respondent and any person who has physical custody of the child.

§ 5450. Hearing and order.

(a) General rule.--Unless the court issues a temporary emergency order pursuant to section 5424 (relating to temporary emergency jurisdiction), upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(1) the child custody determination has not been registered and confirmed under section 5445 (relating to registration of child custody determination) and that:

(i) the issuing court did not have jurisdiction under Subchapter B (relating to jurisdiction);

(ii) the child custody determination for which enforcement is sought has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Subchapter B; or

(iii) the respondent was entitled to notice, but notice was not given in accordance with the standards of section 5408 (relating to notice to persons outside Commonwealth), in the proceedings before the court that issued the order for which enforcement is sought; or

(2) the child custody determination for which enforcement is sought was registered and confirmed under section 5445 but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Subchapter B.

(b) Costs, fees and expenses.--The court shall award the costs, fees and expenses authorized under section 5452 (relating to costs, fees and expenses) and may grant additional relief, including a request for the assistance of law enforcement officials, and set a further hearing to determine whether additional relief is appropriate.

(c) Refusal to testify.--If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(d) Spousal privilege unavailable.--A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under this subchapter.

§ 5451. Warrant to take physical custody of child.

(a) General rule.--Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this Commonwealth.

(b) Petition.--If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this Commonwealth, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by section 5448(b) (relating to expedited enforcement of child custody determination).

(c) Warrant.--A warrant to take physical custody of a child must:

- (1) recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;
- (2) direct law enforcement officers to take physical custody of the child immediately; and
- (3) provide for the placement of the child pending final relief.

(d) Time of service.--The respondent must be served with the petition, warrant and order immediately after the child is taken into physical custody.

(e) Enforcement.--A warrant to take physical custody of a child is enforceable throughout this Commonwealth. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(f) Appearance of child.--The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

§ 5452. Costs, fees and expenses.

(a) General rule.--The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.



(b) Assessment against a state.--The court may not assess fees, costs or expenses against a state unless authorized by law other than this chapter.

§ 5453. Recognition and enforcement.

A court of this Commonwealth shall accord full faith and credit to an order issued by another state and consistent with this chapter which enforces a child custody determination by a court of another state unless the order has been vacated, stayed or modified by a court having jurisdiction to do so under Subchapter B (relating to jurisdiction).

§ 5454. Appeals.

An appeal may be taken from a final order in a proceeding under this subchapter in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under section 5424 (relating to temporary emergency jurisdiction), the enforcing court may not stay an order enforcing a child custody determination pending appeal.

§ 5455. Role of prosecutor or public official.

(a) General rule.--In a case arising under this chapter or involving the Hague Convention on the Civil Aspects of International Child Abduction, the prosecutor or other appropriate public official may take any lawful action, including resort to a proceeding under this subchapter or any other available civil proceeding to locate a child, obtain the return of a child or enforce a child custody determination if there is:

- (1) an existing child custody determination;
- (2) a request to do so from a court in a pending child custody proceeding;
- (3) a reasonable belief that a criminal statute has been violated; or
- (4) a reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(b) Authority.--A prosecutor or appropriate public official acting under this section acts on behalf of the court and may not represent any party.

§ 5456. Role of law enforcement.

At the request of a prosecutor or other appropriate public official acting under section 5455 (relating to role of prosecutor or public official), a law enforcement officer may

take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official with responsibilities under section 5455.

§ 5457. Costs and expenses.

If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or other appropriate public official and law enforcement officers under section 5455 (relating to role of prosecutor or public official) or 5456 (relating to role of law enforcement).

#### SUBCHAPTER D INTRASTATE APPLICATION

##### Section

5471. Intrastate application.

§ 5471. Intrastate application.

The provisions of this chapter allocating jurisdiction and functions between and among courts of different states shall also allocate jurisdiction and functions between and among the courts of common pleas of this Commonwealth.

#### SUBCHAPTER E MISCELLANEOUS PROVISIONS

##### Section

5481. Application and construction.

5482. Severability.

§ 5481. Application and construction.

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 5482. Severability.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

## **Appendix F-6: PA General Domestic Relations Rules**

**CHAPTER 1930. RULES RELATING TO DOMESTIC  
RELATIONS MATTERS GENERALLY**

Rule

- 1930.1. Form of Pleadings. Form of Caption.
- 1930.2. No Post-trial Practice. Motions for Reconsideration.
- 1930.3. Testimony by Electronic Means.
- 1930.4. Service of Original Process in Domestic Relations Matters.
- 1930.5. Discovery in Domestic Relations Matters.
- 1930.6. Paternity action.
- 1931. Family Court Rules.

**Rule 1930.1. Form of Pleadings. Form of Caption.**

The form of the caption in all domestic relations matters shall be substantially as follows:

In the Court of Common Pleas of

\_\_\_\_\_  
County, Pennsylvania.

A. Litigant, )  
Plaintiff )  
No.  
vs. ) \_\_\_\_\_  
of 19  
—  
B. Litigant, )  
Defendant )

(Title of Pleading)

Official Note

As domestic relations matters are no longer quasi-criminal, the phrase “Commonwealth ex rel.” shall not be used in the caption of any domestic relations matter.

**Source**

The provisions of this Rule 1930.1 adopted December 2, 1994, effective March 1, 1995, 24 Pa.B. 6293.

**Rule 1930.2. No Post-trial Practice. Motions for Reconsideration.**

- (a) There shall be no motions for post-trial relief in any domestic relations matter.
- (b) A party aggrieved by the decision of the court may file a motion for reconsideration in accordance with Rule of Appellate Procedure 1701(b)(3). If the court does not grant the motion for reconsideration within the time permitted, the time for filing a notice of appeal will run as if the motion for reconsideration had never been filed.

Official Note

Rule of Appellate Procedure 903 states that, except as otherwise set forth by that rule, the Notice of Appeal shall be filed within thirty days after the entry of the order from which the appeal is taken.

- (c) The reconsidered decision, except as set forth in subdivision (e), shall be rendered within 120 days of the date the motion for reconsideration is granted. If it is not rendered within 120 days, the motion shall be deemed denied.
- (d) The time for filing a notice of appeal will begin to run anew from the date of entry of the reconsidered decision, or, if the court does not enter a reconsidered decision within 120 days, from the 121st day.
- (e) If the court grants the motion for reconsideration, and files same, within the 30 day appeal period, it may, at any time within the applicable 120 day period thereafter, issue an order directing that additional testimony be taken. If it does, the reconsidered decision need not be rendered within 120 days, and the time for filing a notice of appeal will run from the date the reconsidered decision is rendered.

**Source**

The provisions of this Rule 1930.2 adopted March 30, 1994, effective July 1, 1994, 24 Pa.B. 1941; amended May 31, 2000, effective July 1, 2000, 30 Pa.B. 3155. Immediately preceding text appears at serial pages (256289) to (256290).

**Rule 1930.3. Testimony by Electronic Means.**

With the approval of the court upon good cause shown, a party or witness may be deposed or testify by telephone, audiovisual or other electronic means at a designated location in all domestic relations matters.

## Source

The provisions of this Rule 1930.3 adopted December 8, 1994, effective July 1, 1995, 24 Pa.B. 6399; amended May 31, 2000, effective July 1, 2000, 30 Pa.B. 3155.

Immediately preceding text appears at serial page (256290).

### **Rule 1930.4. Service of Original Process in Domestic Relations Matters.**

(a) *Persons Who May Serve.* Original process in all domestic relations matters may be served by the sheriff or a competent adult:

(1) by handing a copy to the defendant; or

(2) by handing a copy

(i) at the residence of the defendant to an adult member of the family with whom the defendant resides; but if no adult member of the family is found, then to an adult person in charge of such residence; or

(ii) at the residence of the defendant to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which the defendant resides; or

(iii) at any office or usual place of business of the defendant to the defendant's agent or to the person for the time being in charge thereof.

(3) or pursuant to special order of court.

#### Official Note

See Rule 76 for the definition of "competent adult."

(b) *Service in Protection From Abuse Matters.* In Protection from Abuse matters only, original process may also be served by an adult using any means set forth in subdivision (a) above. If personal service cannot be completed within forty-eight (48) hours after a Protection From Abuse petition is filed, the court may, by special order as set forth in subdivision (a)(3) above, authorize service by another means including, but not limited to, service by mail pursuant to subdivision (c) of this rule.

(c) *Service by Mail.* Except in Protection from Abuse matters unless authorized by special order of court pursuant to subdivision (b) above, original process may also be served by mailing the complaint and order to appear, if required, to the defendant's last known address by both regular and certified mail. Delivery of the certified mail must be restricted to addressee only, and a return receipt must be requested.

(1) If the certified mail is refused by defendant, but the regular mail is not returned within fifteen days, service may be deemed complete.

(2) If the mail is returned with notation by the postal authorities that it was unclaimed, service shall be made by another means pursuant to these rules.

(d) *Acceptance of Service.* In lieu of service pursuant to this rule, the defendant or the defendant's authorized agent may accept service of original process by filing with the prothonotary a separate document which shall be substantially in the following form:

(Caption)  
ACCEPTANCE OF SERVICE

I accept service of the

\_\_\_\_\_  
. NAME OF DOCUMENT

I certify that I am authorized to accept service on behalf of the defendant.

\_\_\_\_\_  
DATE

DEFENDANT OR AUTHORIZED AGENT

\_\_\_\_\_  
MAILING ADDRESS

Official Note

If defendant accepts service personally, the second sentence should be deleted.

(e) *Time for Service Within the Commonwealth.* Original process shall be served within the Commonwealth within thirty days of the filing of the petition or complaint.

(f) *Service Outside of the Commonwealth.* Original process shall be served outside the Commonwealth within ninety days of the filing of the complaint:

(1) by any means authorized by this rule; or

(2) in the manner provided by the law of the jurisdiction in which defendant will be served; or

(3) in the manner provided by treaty; or

(4) as directed by the foreign authority in response to a letter rogatory or request.

In Protection from Abuse matters, the defendant must be personally served with original process outside of the Commonwealth. Such service may be made either in accordance with subdivisions (a) and (b) of this Rule governing personal service or as provided for by law in the jurisdiction where the defendant resides. If personal service cannot be completed within 48 hours after entry of the protection order, service outside of the Commonwealth may be made by any other means authorized by this rule.

Official Note:

Sections 5323 and 5329(2) of the Judicial Code, 42 Pa.C.S. § § 5323 and 5329(2), provide additional alternative procedures for service outside the Commonwealth. For Protection from Abuse matters, personal service outside of the Commonwealth must first be attempted before service can be made by certified and regular mail or by any of the other means prescribed in subsection (f) of this Rule for out-of-state service.

(g) *Reinstatement of Complaint.* If service is not made as required by subdivision (e) or (f) of this rule, the prothonotary upon praecipe accompanied by the original process, or praecipe indicating that the original complaint has been lost or destroyed accompanied by a substituted complaint, shall reinstate the complaint.

(1) A complaint may be reinstated at any time and any number of times. A new party defendant may be named in a reinstated complaint.

(2) A reinstated complaint shall be served as required by subdivision (e) or (f) of this rule.

(h) *Proof of Service.* Proof of service shall be made as follows:

(1) The person making service of original process shall make a return of service forthwith. If service has not been made within the time allowed, a return of no service shall be made upon the expiration of the period allowed for service.

(2) Proof of service shall set forth the date, time, place and manner of service, the identity of the person served and any other facts necessary for the court to determine whether proper service has been made.

(3) Proof of service by a person other than the sheriff shall be by affidavit. If a person other than the sheriff makes a return of no service, the affidavit shall set forth with particularity the efforts made to effect service.

(4) Proof of service by mail shall include a return receipt signed by the defendant or, if the defendant has refused to accept mail service, the returned letter with the notation that



the defendant refused to accept delivery, and an affidavit that the regular mail was not returned within fifteen days after mailing.

(5) Proof of service or of no service shall be filed with the prothonotary.

(6) An executed Acceptance of Service shall be filed in lieu of a Proof of Service where defendant accepts service of original process.

(i) *Appearance at Hearing or Conference.* Regardless of the method of service, a party who appears for the hearing or conference will be deemed to have been served.

#### **Source**

The provisions of this Rule 1930.4 adopted October 2, 1995, effective January 1, 1996, 25 Pa.B. 4518; amended May 14, 1999, effective July 1, 1999, 29 Pa.B. 2767; amended October 11, 2002, effective immediately, 32 Pa.B. 5263. Immediately preceding text appears at serial pages (281442) to (281444).

#### **Rule 1930.5. Discovery in Domestic Relations Matters.**

(a) There shall be no discovery in a simple support, custody or Protection from Abuse proceeding unless authorized by order of court.

(b) Discovery shall be available without leave of court in accordance with R.C.P. 4001 et seq. in alimony, equitable distribution, counsel fee and expense and complex support proceedings.

#### **Source**

The provisions of this Rule 1930.5 adopted May 5, 1997, effective July 1, 1997, 27 Pa.B. 2532; amended March 9, 1998, effective July 1, 1998, 28 Pa.B. 1391; amended June 5, 2001, effective immediately, 31 Pa.B. 3306. Immediately preceding text appears at serial page (267805).

#### **Rule 1930.6. Paternity Actions.**

(a) *Scope.* This rule shall govern the procedure by which a putative father may initiate a civil action to establish paternity and seek genetic testing. Such an action shall not be permitted if an order already has been entered as to the paternity, custody or support of the child, or if a support or custody action to which the putative father is a party is pending.

(b) *Venue*. An action may be brought only in the county in which the defendant or the child(ren) reside.

(c) *Commencement of Action*. An action shall be initiated by filing a verified complaint to establish paternity and for genetic testing substantially in the form set forth in subdivision (1) below. The complaint shall have as its first page the Notice of Hearing and Order set forth in subdivision (2) below.

(1) The complaint filed in a civil action to establish paternity shall be substantially in the following form:

**(Caption)**

**COMPLAINT TO ESTABLISH PATERNITY AND FOR GENETIC TESTING**

Plaintiff,

\_\_\_\_\_  
, requests genetic testing to establish paternity pursuant to 23 Pa.C.S. § 4343 and in support of that request states that:

1. Plaintiff is an adult individual who resides at

\_\_\_\_\_  
.

2. Defendant is an adult individual who resides at

\_\_\_\_\_  
.

3. Defendant is the natural mother and Plaintiff believes that he may be the natural father of the following child(ren):

Child's Name    Date of Birth

---

---

4. The above-named children reside at the following address with the following individuals:

Address	Person(s) Living with Child	Relationship to Child
---------	-----------------------------	-----------------------

---

5. Defendant was/was not married at the time the child(ren) was/were conceived or born.

6. Defendant is/is not now married. If married, spouse's name:

---

7. There is/is not a custody, support or other action involving the paternity of the above-named child(ren) now pending in any jurisdiction. Identify any such actions by caption and docket number

---

8. There has/has not been a determination by any court as to the paternity of the child(ren) in any prior support, custody, divorce or any other action. If so, identify the action by caption and docket number

---

9. Plaintiff agrees to pay all costs associated with genetic testing directly to the testing facility in accordance with the procedures established by that facility.

Wherefore, Plaintiff requests that the court order Defendant to submit to genetic testing and to make the child(ren) available for genetic testing.

I verify that the statements made in this complaint are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made

subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

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Petitioner

(2) The Notice of Hearing and Order required by this rule shall be substantially in the following form:

**(Caption)**  
**NOTICE OF HEARING AND ORDER**

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following papers, you must appear at the hearing scheduled below. If you fail to do so, the case may proceed against you and a final order may be entered against you granting the relief requested by the plaintiff.

Plaintiff and Defendant are directed to appear on the

—  
day of

—  
, 20

—  
at

—  
.m. in courtroom

—  
for a hearing on Plaintiff's request for genetic testing. If you fail to appear as ordered, the court may enter an order in your absence requiring you and your child(ren) to submit to genetic tests.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

(name)

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(address)

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(telephone number)

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### **Americans with Disabilities Act of 1990**

The Court of Common Pleas of

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County is required by law to comply with the Americans with Disabilities Act of 1990. For information about accessible facilities and reasonable accommodations available to disabled individuals having business before the court, please contact our office. All arrangements must be made at least 72 hours prior to any hearing or business before the court. You must attend the scheduled conference or hearing.

(d) *Service*. Service of original process and proof of service in a civil action to establish paternity shall be in accordance with Rule 1930.4.

(e) *Hearing and Order*. At the hearing, the judge will determine whether or not the plaintiff is legally entitled to genetic testing and, if so, will issue an order directing the defendant and the child(ren) to submit to genetic testing, the cost of which shall be borne by the plaintiff.

### **Source**

The provisions of this Rule 1930.6 adopted June 5, 2001, effective immediately, 31 Pa.B. 3306; amended June 24, 2002, effective immediately, 32 Pa.B. 3389; amended March 18, 2004, effective June 16, 2004, 34 Pa.B. 1754. Immediately preceding text appears at serial pages (290227) to (290228) and (294889).

### **Rule 1931. Family Court Rules.**

(a) *Actions Governed by These Rules:*

(1) *Divorce, Annulment, Dissolution of Marriage.*

(i) *Equitable Distribution.*

- (ii) Alimony/Alimony Pendente Lite.
- (iii) Counsel Fees, Costs and Expenses.

(2) *Child Custody.*

- (i) Legal Custody.
- (ii) Physical Custody.
- (iii) Partial Custody/Visitation.

(3) *Support.*

- (i) Child Support.
- (ii) Spousal Support.
- (iii) Modification and Enforcement.

(4) *Paternity.*

(5) *Protection From Abuse.*

(b) *Commencement of Action.*

(1) *Unified Family Court Docketing.* All actions under these Family Court Rules which involve identical parties shall be entered on the court's docket under the same primary case number. Additional letters or numbers may be added parenthetically to specify the type of action, judge assigned or other identifying information.

(2) *Custody Agreements.* If, at a support proceeding, it appears that resolution of custody issues will facilitate compliance with the child support order, the conference officer, hearing officer or master may provide the parties with a form custody complaint and form custody agreement, along with information as to where to file the completed documents, the filing fee and how to contact the lawyers referral service. The support conference officer, hearing officer or master shall not participate in custody negotiations, preparation of the forms or provide legal advice.

(c) *Consolidation of Family Court Matters.*

(1) *General Rule.* Two or more actions under these Family Court Rules involving the same parties and common questions of law and/or fact shall be consolidated for hearing or trial unless the court determines that it is inappropriate or impractical to do so.

(2) *Trial Continuity.* Trials before a judge or hearings before a master shall be scheduled to be heard on consecutive days or within a ten (10) day period. If not completed within the time allotted, the trial or hearing shall be concluded within ninety (90) days of the date of the commencement of the trial or hearing, unless a shorter time frame is required by statute or another procedural rule.

(3) *Prompt Decisions.*

(i) Except as provided in subdivision (ii) below, in any matter brought under these Family Court Rules, a decision by a conference officer, master or judge shall be entered, filed and served upon counsel for the parties, or any party not represented by counsel, not later than thirty (30) days after the conference, hearing or trial concludes, unless a shorter time frame is required by statute or another procedural rule.

(ii) The time for entering and filing a decision may be extended if, within thirty (30) days of the conclusion of the conference, hearing or trial, the court extends the date for such decision by order entered of record showing good cause for the extension. In no event shall an extension delay entry of the decision more than sixty (60) days after the conclusion of the conference, hearing or trial.

(d) *Continuing Education for Family Court Personnel.*

(1) *Program Development.* Courses of instruction that include, at a minimum, the following topics shall be developed or approved by the Administrative Office of Pennsylvania Courts (AOPC):

(i) The substantive law and procedural aspects of the areas of law governed by these Family Court Rules;

(ii) Domestic violence;

(iii) Child development;

(iv) Family dynamics;

(v) Addictions and treatments;

(vi) Asset valuation;

(vii) Community resources.

(2) *Initial Training.* Within one (1) year of assignment to cases governed by these Family Court Rules, each master, hearing officer, conciliator, mediator and other court

personnel designated by the president or administrative judge of each judicial district shall successfully complete the coursework developed or approved by the AOPC.

(3) *Continuing Education.* Each master, hearing officer, conciliator, mediator and other court personnel designated by the president or administrative judge who is assigned to cases governed by these Family Court Rules shall successfully complete six (6) hours of continuing education developed or approved by the AOPC each calendar year following the calendar year in which the initial training was completed.

(4) *Compliance.* The AOPC shall monitor compliance with the educational requirements of this rule.

#### **Source**

The provisions of this Rule 1931 adopted December 17, 2002, effective immediately in the First, Fifth, Twenty-third and Forty-fifth Judicial Districts, 33 Pa.B. 13.



## **Appendix F-7: PA Custody Mediation Rules**

## **CHAPTER 1940. VOLUNTARY MEDIATION IN CUSTODY ACTIONS**

### **Rule**

- 1940.1. Applicability of Rules to Mediation.
- 1940.2. Definitions.
- 1940.3. Order for Orientation Session and Mediation. Selection of Mediator.
- 1940.4. Minimum Qualifications of the Mediator.
- 1940.5. Duties of the Mediator.
- 1940.6. Termination of Mediation.
- 1940.7. Mediator Compensation.
- 1940.8. Sanctions.
- 1940.9. Effective Date.

### **Source**

The provisions of this Chapter 1940 adopted October 28, 1999, effective immediately, 30 Pa.B. 5820, unless otherwise noted.

### **Rule 1940.1. Applicability of Rules to Mediation.**

The rules in this chapter shall apply to all court-established custody mediation programs and to any court-ordered mediation of individual custody cases.

### **Rule 1940.2. Definitions.**

As used in this Chapter, the following terms shall have the following meanings:

“Mediation” is the confidential process by which a neutral mediator assists the parties in attempting to reach a mutually acceptable agreement on issues arising in a custody action. The role of the mediator is to assist the parties in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties must be based on the voluntary decisions of the parties and not the decision of the mediator. The agreement may resolve all or only some of the disputed issues. Parties are required to mediate in good faith, but are not compelled to reach an agreement. While mediation is an alternative means of conflict resolution, it is not a substitute for the benefit of legal advice.

“Memorandum of Understanding” is the written document prepared by a mediator which contains and summarizes the resolution reached by the parties during mediation. A Memorandum of Understanding is primarily for the benefit of the parties and is not legally binding on either party.

“Orientation Session” is the initial process of educating the parties on the mediation process so that they can make an informed choice about continued participation in mediation. This process may be mandated by the court and may be structured to include either group or individual sessions. An orientation session may also include an educational program for parents and children on the process of divorce and separation and the benefits of mediation in resolving custody disputes.

**Rule 1940.3. Order for Orientation Session and Mediation. Selection of Mediator.**

(a) Except as provided in (b), the court may order the parties to attend an orientation session at any time upon motion by a party, stipulation of the parties, or the court’s own initiative.

(b) The court may not order an orientation session if a party or a child of either party is or has been the subject of domestic violence or child abuse either during the pendency of the action or within 24 months preceding the filing of the action.

Official Note

See also Rule 1940.6(a)(4) requiring termination of mediation when the mediator finds that the proceeding is “inappropriate” for mediation. The mediator has a continuing ethical obligation, consistent with Rule 1940.4(b), during the mediation to screen for abuse and to terminate the mediation in the event he or she determines that the abuse renders the case unsuitable for mediation.

(c) Following the orientation session and with the consent of the parties, the court may refer the parties to mediation. The mediation may address any issues agreed to by the parties unless limited by court order.

**Rule 1940.4. Minimum Qualifications of the Mediator.**

(a) A mediator must have at least the following qualifications:

(1) a bachelor’s degree and practical experience in law, psychiatry, psychology, counseling, family therapy or any comparable behavioral or social science field;

(2) successful completion of basic training in domestic and family violence or child abuse and a divorce and custody mediation program approved by the Association for Conflict Resolution, American Bar Association, American Academy of Matrimonial Lawyers, or Administrative Office of Pennsylvania Courts;

(3) mediation professional liability insurance; and

(4) additional mediation training consisting of a minimum of 4 mediated cases totaling 10 hours under the supervision of a mediator who has complied with subdivisions (1) through (3) above and is approved by the court to supervise other mediators.

(b) The mediator shall comply with the ethical standards of the mediator profession as well as those of his or her primary profession and complete at least 20 hours of continuing education every two years in topics related to family mediation.

(c) A post-graduate student enrolled in a state or federally accredited educational institution in the disciplines of law, psychiatry, psychology, counseling, family therapy or any comparable behavioral or social science field may mediate with direct and actual supervision by a qualified mediator.

### **Source**

The provisions of this Rule 1940.4 amended July 21, 2004, effective immediately, 34 Pa.B. 4107. Immediately preceding text appears at serial page (270832).

### **Rule 1940.5. Duties of the Mediator.**

(a) As part of the orientation session, the mediator must inform the parties in writing of the following:

(1) the costs of mediation;

#### **Official Note**

Rule 240 sets forth the procedures for obtaining leave to proceed in forma pauperis when the parties do not have the financial resources to pay the costs of litigation. This rule applies to court-connected mediation services as well, so that parties without sufficient resources may file a petition seeking a waiver or reduction of the costs of mediation.

(2) the process of mediation;

(3) that the mediator does not represent either or both of the parties;

(4) the nature and extent of any relationships with the parties and any personal, financial, or other interests that could result in a bias or conflict of interest;

(5) that mediation is not a substitute for the benefit of independent legal advice; and

(6) that the parties should obtain legal assistance for drafting any agreement or for reviewing any agreement drafted by the other party.

(b) When mediating a custody dispute, the mediator shall ensure that the parties consider fully the best interests of the child or children.

(c) With the consent of the parties, the mediator may meet with the parties' children or invite other persons to participate in the mediation.

#### **Rule 1940.6. Termination of Mediation.**

(a) Mediation shall terminate upon the earliest of the following circumstances to occur:

(1) a determination by the mediator that the parties are unable to reach a resolution regarding all of the issues subject to mediation;

(2) a determination by the mediator that the parties have reached a resolution regarding all of the issues subject to mediation;

(3) a determination by the mediator that the parties have reached a partial resolution and that further mediation will not resolve the remaining issues subject to mediation; or

(4) a determination by the mediator that the proceedings are inappropriate for mediation.

(b) If the parties reach a complete or partial resolution, the mediator shall, within 14 days, prepare and transmit to the parties a Memorandum of Understanding. At the request of a party, the mediator shall also transmit a copy of the Memorandum of Understanding to the party's counsel.

(c) If no resolution is reached during mediation, the mediator shall, within 14 days, report this in writing to the court, without further explanation.

#### **Rule 1940.7. Mediator Compensation.**

Mediators shall be compensated for their services at a rate to be established by each court.

#### **Rule 1940.8. Sanctions.**

On its own motion or a party's motion, the court may impose sanctions against any party or attorney who fails to comply or causes a party not to comply with these mediation rules. Sanctions may include an award of mediation costs and attorney fees, including those reasonably incurred in pursuing the sanctions.

Official Note

To the extent court orders are employed to direct parties regarding mediation, contempt proceedings may also be instituted to enforce these orders.

**Rule 1940.9. Effective Date.**

These rules shall not affect any existing mediation program established in any judicial district pursuant to local rule prior to October 29, 1999. However, any changes or amendments to any existing program shall be consistent with these rules.

**Source**

The provisions of this Rule 1940.9 adopted October 27, 2000, effective immediately, 30 Pa.B. 5837.

**PENNSYLVANIA DIVORCE LAW**  
**CHAPTER 39. MEDIATION**  
**23 PA. C.S.A. §§ 3901-3904**

§ 3901. Mediation programs.

(a) Establishment.--A court may establish a mediation program for actions brought under this part or Chapter 53 (relating to custody).

(b) Issues subject to mediation.--When a program has been established pursuant to subsection (a), the court may order the parties to attend an orientation session to explain the mediation process. Thereafter, should the parties consent to mediation, the court may order them to mediate such issues as it may specify.

(c) Local rules.--

1. The court shall adopt local rules for the administration of the mediation program to include rules regarding qualifications of mediators, confidentiality and any other matter deemed appropriate by the court.
2. The court shall not order an orientation session or mediation in a case where either party or child of either party is or has been a subject of domestic violence or child abuse at any time during the pendency of an action under this part or within 24 months preceding the filing of any action under this part.

(d) Model guidelines.--The Supreme Court shall develop model guidelines for implementation of this section and shall consult with experts on mediation and domestic violence in this Commonwealth in the development thereof. The effective date of this chapter shall not be delayed by virtue of this subsection.

§ 3902. Fees and costs.

(a) Imposition of fee.--A county in which the court has established a mediation program may impose an additional filing fee of up to \$20 on divorce and custody complaints to be used to fund the mediation program.

(b) Assessment of additional costs.--The court may assess additional costs of mediation on either party.

§ 3903. Review of programs.

The Supreme Court shall monitor mediation programs established by courts of common pleas. The Supreme Court shall establish procedures for the evaluation of the effectiveness of the program.

§ 3904. Existing programs.

This chapter shall not affect any existing mediation program established in any judicial district pursuant to local rule.