NEW MEXICO DOMESTIC VIOLENCE BENCHBOOK

CRIMINAL AND CIVIL PROCEEDINGS INVOLVING DOMESTIC VIOLENCE

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New Mexico Domestic Violence Benchbook

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NEW MEXICO DOMESTIC VIOLENCE BENCHBOOK

Criminal and Civil Proceedings Involving Domestic Violence

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PREFACE

Acknowledgements

The New Mexico Judicial Education Center at the Institute of Public Law, University of New Mexico School of Law, gratefully acknowledges the generous assistance provided by the expert volunteers who helped in developing the New Mexico Domestic Violence Benchbook.

Numerous individuals contributed their expertise and time in providing background material, researching and writing portions of the benchbook, and reviewing and editing drafts. They include:

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Purpose

The purpose of this benchbook is to provide all levels of the state judiciary with a comprehensive resource guide to domestic violence civil and criminal proceedings. The benchbook incorporates the applicable requirements of state and federal laws and court cases. It provides information on the dynamics of domestic violence, explains the process governing orders of protection, describes how domestic violence can affect a variety of civil and criminal cases, and addresses pretrial, trial and sentencing issues.

The benchbook is intended to serve as a current, convenient secondary source of law, policy and practice for domestic violence proceedings. Do not rely on the benchbook as legal authority; instead, consult primary sources for specific legal language and requirements.

Style and Format

The benchbook is written in an expository style, using proscriptive language only when the law requires a particular action. Abbreviations are kept to a minimum and should be readily recognizable when encountered. Likewise, citations to statutes, rules and cases use the most concise style possible while still providing adequate reference information. Full citations can be found in the statute and case lists in the appendices. In general, citations in the text use the following style:

- Statutes: New Mexico statutes are cited as §__-__-__, such as §32A-4-1, without "NMSA 1978." Federal laws are cited as __ U.S.C. §___, such as 25 U.S.C. §1901.

- Rules: New Mexico judicial rules are cited as Rule __-___, such as Rule 10-301, without the addition of "NMRA."

- Cases: New Mexico cases are cited using the New Mexico Reports citation, such as 116 N.M. 456 (1993), and, if available, the vendor-neutral citation adopted in 1998, such as 1998-NMCA-039.

Effective Date

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CHAPTER 1

OVERVIEW OF DOMESTIC VIOLENCE

This chapter covers:

- Definition of domestic violence.
- Patterns of violence.
- Causes of abuse.
- Understanding the abuser and abusive tactics.
- Assessing lethality.
- Understanding the victim.
- Effects of domestic violence on children.
- Ethical concerns with judicial participation in a coordinated community response.

1.1 Introduction

Domestic violence can affect proceedings in all of New Mexico's courts. It arises in various criminal contexts, ranging in seriousness from misdemeanor property offenses to murder. It can also be an important factor in civil proceedings, most notably in the area of domestic relations. In whatever context it occurs, domestic violence presents the court with unique concerns, the foremost of which is the safety of the litigants and court personnel. These heightened safety concerns arise from the intimate relationship between the perpetrator and the victim of domestic violence. This relationship increases the potential for danger in the following ways:

- A domestic violence perpetrator typically has unlimited access to the victim. The perpetrator and victim may live together, or have regular contact for purposes of exercising parental rights. If the perpetrator and victim are not living together, the perpetrator typically knows the victim's daily routine, or has ready access to information about the victim's whereabouts.

- Domestic violence perpetrators exercise a pattern of physical, social, psychological, and/or economic control over their intimate partners. Many abusers who perceive a loss of control over their partners will resort to physical violence to regain it. Accordingly, a court's intervention in abusive behavior may increase the risk of violence for everyone concerned with the case.

- Domestic violence typically occurs in the privacy of the home, where its only witnesses are under the control of the abuser. These circumstances often impede the court's fact finding process, as well as a victim's ability to participate in it. They may also cause a victim to behave in ways that appear "crazy" to outside observers who do not have the information to discern the "craziness" as a normal response to abuse.

To respond to these concerns, this chapter briefly summarizes some of the research findings on the dynamics of domestic violence, in the assumption that an understanding of this subject will help the court to promote the safety of the parties and court personnel. In using this chapter, however, the reader is cautioned that domestic violence research is a relatively new field of study — psychologists and sociologists have only turned their attention to it within the last 25 to 30 years. Because this field is so new, the following caveats apply:

- Domestic violence perpetrators can be men or women involved in heterosexual or same-sex intimate relationships, and New Mexico's laws against domestic violence make no distinction based on the parties' gender or sexual orientation. Nonetheless, the discussion in this chapter will assume a heterosexual relationship with a male abuser unless otherwise indicated. The discussion uses this assumption because most domestic violence research has been done in this context. Violence in same-sex relationships and in heterosexual relationships with female abusers has not been much studied to date, and is not well understood. According to the National Crime Victimization Survey (1992-1996), about 85% of victims of intimate violence are women. Although less likely than men to experience violent crime overall, women are 5 to 8 times more likely than men to be victimized by an intimate. Greenfeld, et al, *Violence by Intimates,* p. 1, 4 (Bureau of Justice Statistics, 1998).

- While much research regarding heterosexual relationships with male abusers has been published, many questions remain about this type of domestic violence, and studies of it are ongoing. Far less is known about same-sex domestic violence, though some research is beginning to emerge. See, e.g. Lemon, Domestic Violence Law 190-231 (2001) (discussing gay and lesbian battering). Accordingly, the reader should be alert for new information that is likely to appear after the publication date of this Benchbook.

1.2 Defining Domestic Violence

A discussion of all forms of intra-family violence is beyond the scope of this Benchbook. For purposes of this Benchbook, the terms "domestic abuse" or "domestic violence" will be used interchangeably to refer to the following behaviors and parties:

- In the context of this Benchbook, "domestic violence" or "domestic abuse" is more than an isolated instance of physical abuse within an intimate relationship — it is a **pattern** of physical, sexual, emotional, and/or financial abuse, perpetrated with the intent and result of establishing and maintaining control over an intimate partner. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases,* Appendix C, p. 2-6, in Lemon, Domestic Violence and Children (Family Violence Prevention Fund, 1995). The abuser's pattern of behavior may include both criminal and non-criminal acts. Criminal behaviors may include: hitting, choking, kicking, assaulting with a weapon, shoving, scratching, biting, raping, kidnapping, threatening violence, stalking, destroying property, and attacking pets. Non-criminal behaviors may include: making degrading comments, interrogating children or other family members, threatening or attempting to commit suicide, controlling access to money, and monitoring the victim's time and activities. The abuse may be directed at persons other than the victim (e.g., children) for the purpose of controlling the victim.

- The parties to abuse who are the focus of this Benchbook are the **adult intimates** who form the nucleus of a past, present, or incipient family relationship in its broadest sense. These adults can include past or present spouses, cohabitants, sexual intimates, and dating acquaintances. A discussion of juvenile parties to abuse outside of dating relationships is beyond the scope of this Benchbook. Elder abuse occurring outside the family relationship context is also beyond the scope of this Benchbook.

1.3 Patterns of Violence

Some studies indicate that domestic violence tends to escalate in frequency and seriousness over time, particularly where there is no effective intervention from the criminal justice system or other social institutions. Walker, The Battered Woman Syndrome, p. 26 (Springer, 1984); *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence*, p. 32 (Nat'l Center for State Courts, 1997). This dynamic makes it important to treat domestic violence incidents as a serious threat to the victim from their earliest manifestations — many domestic violence homicides maybe prevented with early intervention against abusive behavior.

Researchers have also reported that in some relationships, domestic abuse follows a predictable course, of which the victim may be aware. Although all violent relationships do not exhibit predictable patterns, some victims may have experienced the abusive pattern so often that they can anticipate when a violent incident is about to occur. Where the parties' relationship exhibits a pattern of violence, the court's understanding of the pattern can provide insight into the parties' behavior and inform efforts to promote safety.

The "cycle of violence" is one common abusive pattern noted in the research. It consists of three stages:

- During the first stage of the cycle, **tension builds** gradually between the parties. The abuser expresses dissatisfaction and hostility, but not in an extreme or explosive form.

The victim tries to placate the abuser. The victim may succeed for a time, which reinforces an unrealistic belief that it is possible to control the abuser.

- When the tension becomes unbearable, the abuser proceeds to the second stage — the **acute battering incident**. This incident becomes inevitable without intervention.

- After the release of tension in the abusive incident, a third **loving contrition stage** follows. In this stage, the abuser may express remorse, behave affectionately toward the victim, and promise that the abuse will end. The abuser may sincerely believe that violence will never occur again. Both parties may deny or minimize the abuse, or the victim may accept the abuser's blame for provoking the abuse.

Walker, The Battered Woman Syndrome, p. 95-97 (Springer, 1984).

Researchers studying abuse in same-sex relationships have noted cyclical patterns of violence similar to the "cycle of violence" described above. One study of domestic abuse in lesbian relationships has also reported that like heterosexual violence, lesbian violence tends to escalate over time. Coleman, *Lesbian Battering*, in Domestic Partner Abuse, p. 79-80 (Hamberger & Renzetti ed., Springer, 1996).

Another dynamic noted by researchers working with victims in abusive relationships is the "Stockholm Syndrome." This dynamic was first noticed in 1973 after hostages in a bank holdup in Stockholm, Sweden, bonded with the captors who had held them for six days. Based on studies of this group and other hostage groups (including battered women), researchers have posited that bonding to an abuser or captor may be an instinctive survival function for individuals who:

- Perceive a threat to survival and believe that their captor is willing to carry out the threat;

- Perceive a small kindness from the captor within the context of the terrifying experience;

- Are isolated from the perspectives of persons other than their captors; and,

- Believe they cannot escape.

The effect of these conditions on the captive individual has been described as follows:

> "As a result of being traumatized, the victim needs nurturance and protection. Being isolated from others, the victim must turn to her abuser for the needed nurturance and protection if she turns to anyone. If the abuser shows the victim some small kindness, this creates hope in the victim, who then denies her rage at the terror-creating side of the abuser — because this rage would be experienced as overwhelming — and bonds to the positive side of the abuser. With the hope that the abuser will let her live, the victim works to keep the abuser happy, becoming hypersensitive to his moods and

> needs. To determine what will keep the abuser happy, the victim tries to think and feel as the abuser thinks and feels. The victim therefore (unconsciously) takes on the world view of the abuser. Because so much is at stake, namely her survival, the victim is hypervigilant to the abuser's needs, feelings and perspectives. Her own needs (other than survival), feelings and perspectives must take second place to the abuser's. Also, the victim's needs, feelings and perspectives can only get in the way of the victim doing what she must do to survive: they are, after all, feelings of terror. Therefore, the victim denies her own needs, feelings and perspectives. She sees the captors as the 'good guys' and those trying to win her release (for example parents, police or therapists) as the 'bad guys,' as this is the way her captor sees things. The victim projects the anger of the abuser onto the police, whom she sees as more likely to kill her (or get her killed) than the captors....If the victim is given the opportunity to leave the abuser, she will have an extremely difficult time doing so. Having denied the violent, terrifying side of the abuser as well as her own anger, the victim sees no reason to leave him."

Graham & Rawlings, *Bonding with Abusive Dating Partners: Dynamics of Stockholm Syndrome*, in Dating Violence: Young Women in Danger, p. 121-122 (Levy, ed., Seal Press, 1991).

1.4 Causes of Abuse

Because domestic violence is a relatively new field of study, its causes are still not fully understood. Many researchers have posited that domestic violence is caused by a combination of social and individual factors. Most characterize it as a pattern of behavior that is learned and chosen by the abuser, and encouraged or discouraged by the abuser's social environment. This section explores the role that various social factors play in the abuser's choice to use violence.

1.4.1 The Environment of Abuse

Researchers have noted three circumstances that are generally present in an environment where abuse is occurring:

- **The perpetrator has learned to abuse.**

  Domestic violence perpetrators have learned that violence is an effective, legitimate means of controlling their partners. They have learned this lesson by observing violent behavior in others or by engaging in it themselves on a trial-and-error basis, and discovering that it is tolerated, or even rewarded. In New Mexico in 1999, over half of offenders (59%) and victims (57%) served by domestic violence service providers reported experiencing abuse as a child. Caponera, *Incidence and Nature of Domestic Violence in New Mexico: An Analysis of 1999 Data from the New Mexico Domestic Violence Data Central Repository*, p. iv (June 2000). Violent behavior can be fostered in various private and public social settings. Violent families and societal attitudes that devalue women can contribute to an environment that teaches abuse.

The criminal justice system also teaches that abuse is acceptable when it fails to impose appropriate sanctions on violent behavior.

- **The perpetrator has found the opportunity to abuse.**

  Although violent behavior can be learned in violent families, not all children of violent homes become abusive as adults. Likewise, the vast majority of men who are exposed to social attitudes that devalue women do not commit acts of violence against their domestic partners. For violence to occur, the perpetrator must also find the opportunity to "get away with it," and choose to act on this opportunity. Opportunities for domestic violence occur in environments where it is tolerated. Abusers who believe that they will "get away with" violence against their domestic partners will have no motivation to change their behavior, particularly if they have learned that violence is an effective tool for asserting control in their intimate relationships. Indeed, social tolerance for domestic violence reinforces the lessons of violence by allowing abusers to succeed in asserting control over their victims without suffering negative consequences. The criminal justice system plays a critical role in ending opportunities for abuse by treating violence against an intimate partner at least as seriously as it treats violence against a stranger.

- **The perpetrator has chosen to abuse.**

  Learning and opportunity alone do not produce domestic violence. The third prerequisite to violent behavior is the perpetrator's choice to engage in it. Domestic violence is not "out-of-control" behavior. Common abusive behavior patterns illustrate how abusers calculate their actions to avoid risk to themselves, while maximizing control over their victims. Some abusers injure only those parts of the victim's body that are not readily seen by others. Others batter the victim as a surrogate for someone over whom they have no control, such as an employer. Many abusers will destroy only the victim's possessions, while leaving their own intact. These behaviors evidence choice, refuting the notion that domestic violence involves the abuser's loss of control.

These circumstances are noted in: Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases,* Appendix C, p. 9-14 in Lemon, Domestic Violence and Children (Family Violence Prevention Fund, 1995); Merrill, *Ruling the Exceptions: Same-Sex Battering and Domestic Violence Theory,* p. 14-17, in Violence in Gay and Lesbian Domestic Partnerships (Renzetti & Miley, ed., Harrington Park Press, 1996); and, Farley, *A Survey of Factors Contributing to Gay and Lesbian Domestic Violence,* p. 36-41 in Violence in Gay and Lesbian Domestic Partnerships, above.

Note: Some researchers have posited that the foregoing circumstances are also prerequisites to violence in same-sex relationships. These researchers cite evidence that a significant percentage of lesbian and gay abusers may have learned violence in their families of origin. They further note that the opportunity to abuse arises from society's reluctance to accept same-sex relationships as legitimate, and from the reluctance of the lesbian and gay

communities to acknowledge that same-sex violence occurs. These attitudes contribute to an environment in which the abusive partner can batter the victim without fear of intervention or consequence, and reinforce the choice to use violence. See Merrill, above, and Farley, above.

Courts can play a critical role in discouraging domestic abuse by treating violence between domestic partners at least as seriously as violence between strangers. Indeed, domestic violence may be a more serious threat to the victim and society than stranger violence, for it entails an increased risk of repeat assault on the victim and the potential for long-term damage to children who are present in a violent home. When courts consistently and fairly enforce the laws against domestic violence they help to remove opportunities for violence, and contribute to an environment in which domestic violence is just as unacceptable as any other type of violence. Many abusers will be motivated to stop their violent behavior upon discovering that it will cause them significant legal and social consequences. Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, p. 14, 39 (Nat'l Inst of Justice, 1996). See §1.8 on the effects of domestic violence on children.

1.4.2 Factors that Commonly Accompany Domestic Violence Without Causing It

Although abusive behavior occurs because the abuser chooses it, many people (including abusers) erroneously characterize domestic violence as out-of-control behavior caused by circumstances commonly present in violent households, such as alcohol and drug use, stress, unresolved anger, or problems inherent in the relationship. While these factors often accompany domestic abuse and may intensify its severity, they do not cause it. The following discussion explores the relationship between these factors and domestic abuse.

- **Alcohol and drug use**

  Researchers generally agree that alcohol and drug use do not cause domestic violence. Ganley, above, p. 11-12; *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence*, p. 33, 45-46 (Nat'l Center for State Courts, 1997). Although studies show a high correlation between these two behaviors, researchers have rejected a causal connection between them, noting that most abusive men who successfully complete alcohol or drug treatment continue to abuse their partners if the violence is not also addressed separately. In New Mexico in 1999, one third (34%) of domestic violence cases reported by law enforcement identified alcohol/drug use. Of these, 95% (6,079) involved use of alcohol/drugs by suspects, and 14% involved used of alcohol/drugs by victims. Caponera, *Incidence and Nature of Domestic Violence in New Mexico: An Analysis of 1999 Data from the New Mexico Domestic Violence Data Central Repository,* p. iv (June 2000). The connection between these behaviors appears to arise from the intensifying role that alcohol and drug use may play in violent relationships. Researchers have reported that abusers with a history of heavy drug or alcohol use tend to engage in intensified violence toward their domestic partners. Alcohol and drug use can lower the abuser's inhibitions and provide an excuse for "losing control." Indeed, some abusers admit to using alcohol in certain situations in order to batter.

Because alcohol or drug use do not cause domestic violence, effective intervention in cases where the abuser is drug or alcohol dependent must be directed at *both* the violence and the substance abuse. Because it may intensify the severity of violence, drug and alcohol use is one of the factors to consider in assessing whether the abuser is likely to kill or seriously injure the victim.

- **Stress and anger**

  Stress and anger are not primary causes of domestic violence. Studies show that many battering episodes are calculated to gain the victim's compliance, and occur when the abuser is not emotionally charged. Indeed, an abuser's display of anger may merely be a tactic to intimidate the victim. Moreover, when domestic violence is regarded as a *pattern* of behavior that unfolds over time, specific irritants or stressors become less meaningful in explaining the entire pattern. Ganley, above, p. 12-13.

  Many researchers believe that effective intervention in abusive behavior must focus on the fact that abuse is the sole choice and responsibility of the abuser. Although abusers may benefit from learning stress or anger management skills, they will not cease to abuse unless these skills are taught in the context of a program that regards violence as a choice for which abusers must be held accountable. See Stordeur & Stille, Ending Men's Violence Against Their Partners, p. 29, 50, 57 (Sage Publications, 1989).

- **Problems inherent in the relationship**

  Abusers frequently escape responsibility for their violent choices by blaming the abuse on their victims. Blaming the relationship is a variation on this theme, because it gives the victim at least partial responsibility for the abuse. A troubled intimate relationship does not inevitably lead to violence, however; most people who experience relational difficulties respond to them without violence. Ganley, above, p. 13-14. Safe, effective domestic violence interventions recognize that only the abuser has the power to stop the abuse.

  Victims are endangered by interventions that require them to share responsibility for the abuse by working cooperatively with the abuser to resolve the parties' relational difficulties. Accordingly, couples counseling and family therapy are inappropriate as primary interventions for abuse. These interventions endanger victims by putting them into a situation where they must disclose information that their abusers may subsequently use against them. Moreover, couples or family counseling may put the parties into physical proximity with one another, creating opportunities for abuse. Finally, where the victim shares responsibility for resolving the parties' difficulties, the abuser may feel justified in using abuse as "punishment" when the couple's difficulties continue; indeed, many victims report assaults following couples therapy sessions. Stordeur & Stille, above, p. 25-26; Walker, The Battered Woman Syndrome, p. 118 (Springer, 1984).

For similar reasons, mediation, community dispute resolution, and arbitration are also inappropriate interventions for violent relationships. Because these interventions require equal bargaining power between the parties, they cannot operate fairly in situations involving domestic violence, where the abuser wields all the power. Furthermore, domestic violence cannot be a subject for negotiation or settlement between the victim and abuser because the victim has no responsibility for changing the abuser's behavior. This is particularly true where the abuse rises to a criminal level; mediation between a crime victim and perpetrator is just as inappropriate in cases involving domestic violence as it is in cases involving stranger violence.

1.4.3 Illness-Based Violence

Most researchers regard domestic abuse as a learned, chosen pattern of behavior characterized by calculated actions versus a lack of control by the abuser. In some cases, however, domestic violence may be a product of a mental illness, such as psychosis or Alzheimer's Disease. Unlike cases where the violence is learned, chosen behavior, these cases truly involve a loss of control by the abuser. Illness-based violence can be distinguished from learning-based violence in several ways:

- The perpetrator of illness-based violence does not usually select a particular, consistent victim; instead, abuse is directed at any person present when the violent impulses arise.

- Illness-based violence is often accompanied by other symptoms of disease, such as changes in speech or gait, or delusional thinking.

- Poor recall of the abuse does not necessarily indicate illness-based violence. Abusers who are not mentally ill often deny or minimize their behavior.

Stordeur & Stille, above, p. 24-26; Ganley, above, p. 11.

1.5 Understanding the Abuser — Assessing Lethality

This section will explore some common characteristics of domestic abusers, as well as factors indicating that an abuser is likely to kill or inflict serious physical harm.

1.5.1 Characteristics of the Abuser

Domestic violence occurs in all social groups, without regard to the parties' racial, ethnic, economic, religious, educational, professional, or social backgrounds, or their sexual orientation. It is not restricted to the ranks of the impoverished, unemployed, or substance-dependent. Because it often occurs within the privacy of the home, domestic violence may be well-hidden from outside observers, including family members who are not living in the household where the abuse occurs. Indeed, many abusers appear to be devoted to their families, and have positive characteristics that mask the injuries they inflict. Rygwelski,

Beyond He Said/She Said, p. 11, 20- 24 (Michigan Coalition Against Domestic Violence, 1995).

Although there is no "typical" abuser, domestic violence perpetrators commonly exhibit certain characteristics. Some of these characteristics include:

- **Dependency and jealousy**

  Many victims report that their abusers are extremely jealous and possessive. Possessive abusers are emotionally dependent on their partners, which makes them susceptible to a number of conflicting emotions, including fear of abandonment, and anger at their dependence. In the context of these feelings, an abuser's behavior may be seen as an effort to prevent abandonment, or as a means of denying the need for the victim's companionship. Extremely jealous abusers may be so possessive that they are willing to kill their victims rather than face losing control over them. Stordeur & Stille, Ending Men's Violence Against Their Partners, p. 44-46 (Sage Publications, 1989).

- **Belief in men's entitlement to dominate women**

  Male abusers may subscribe to a rigid ideal of men's dominant role, with the accompanying belief in men's entitlement to control over persons and events in the household. *Id.*, p. 51-52. Although this characteristic (male domination of women) is unlikely to describe abusers in same-sex relationships, domination and control are common, if not central, features of both heterosexual and gay and lesbian battering. See generally Lemon, Domestic Violence Law 190-231 (2001) (discussing domestic violence in same-sex relationships).

- **Isolation**

  Abusers are often psychologically and socially isolated. They tend to be distrustful of others, afraid of intimate relationships, and unable to share or recognize emotions other than anger. While they may have numerous contacts and acquaintances within the community, these tend to be superficial. Isolation increases an abuser's dependence on the victim, along with the attendant jealous, possessive behavior. *Id.*, p. 49-50.

- **"Jekyll and Hyde" personality**

  Most abusers are not violent all the time — victims and others often describe them as charming and lovable. The loving, caring facet of an abuser's behavior can be one means of convincing the victim to stay involved in the relationship after a violent incident. *Id.*, p. 48-49.

- **Poor interpersonal skills**

  As children, abusers may have had little opportunity to learn interpersonal skills in their families. Their lack of skills gives them few alternatives other than anger and violence to manage conflict or express feelings. Abusers may lack the ability to recognize or acknowledge the emotions they feel, and may perceive most negative feelings as anger. They often have problems with verbally expressing their thoughts, feelings, and needs. Some researchers have noted that assaultive men are poor listeners who cannot communicate directly, especially about their feelings. An abuser may confuse assertiveness with aggression. Abusers frequently misperceive neutral communications or interactions as being threatening or insulting to them; for example, a partner's brief delay in meeting him may cause an abuser to assume that she is having an affair. *Id.*, p. 38-41.

- **Refusal to accept responsibility for the violence**

  When confronted with their violent behavior, abusers commonly avoid responsibility by denying that it occurred, lying about it, minimizing its nature or significance, or blaming it on outside factors such as stress, drunkenness, or provocation from the victim. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, Appendix C, p. 14 -16 in Lemon, Domestic Violence and Children (Family Violence Prevention Fund, 1995). The court may hear such statements as:

  - "It was an accident."
  - "I didn't hurt anyone."
  - "I didn't even use my fist."
  - "The kids didn't see it."
  - "The cop didn't like me."
  - "I couldn't take the nagging anymore."
  - "I was drunk."
  - "I've been under a lot of pressure lately, and I lost control."
  - "She's having an affair. I just want to save my family."

1.5.2 Lethality Factors

Domestic violence kills its victims with alarming frequency. F.B.I. statistics indicate that 30% of all reported female homicide victims in the United States each year are killed by a current or former husband or boyfriend. Special Report, Bureau of Justice Statistics, U.S. Dept. of Justice (May 2000). This deadly potential requires vigilance in all cases involving domestic violence.

Assessing the lethality of a situation is difficult, because abusive relationships can be unpredictable. Lethal violence may occur unexpectedly, without any advance warning from the abuser's behavior, or it may be preceded by one or more circumstances that serve as danger signals. In the latter case, researchers have found that certain factors can often reveal an abuser's potential for serious violence.

One such "lethality factor" is the recent separation of the couple. The U.S. Department of Justice has reported that 75% of the domestic assaults reported to law enforcement agencies occur after the victim is divorced or separated from the assailant. Bureau of Justice Statistics, *Report to the Nation on Crime and Justice,* p. 33 (U.S. Dept. of Justice, 1988). This statistic reflects the dynamic of power and control that is present in abusive relationships. Abusers who perceive that they have lost control over their victims will often intensify their efforts to regain it, resorting in extreme cases to homicide as the ultimate act of dominance over the victim.

Other lethality factors are noted in the following list. While it is impossible to predict with certainty what a given abuser will do, the presence of the following factors can signal the need for extra safety precautions — the more of these factors that are present in a situation, the greater its danger.

- The victim (who is familiar with the abuser's patterns of behavior) believes the abuser's threats may be lethal.
- The abuser threatens to kill the victim or other persons.
- The abuser threatens or attempts suicide.
- The abuser fantasizes about homicide or suicide.
- Weapons are present, and/or the abuser has a history of using weapons.
- The abuse involves strangling, choking, or biting the victim.
- The abuser has easy access to the victim or the victim's family.
- The couple has a history of prior calls to the police for help.
- The abuser exhibits stalking behavior.
- The abuser is jealous and possessive, or imagines the victim is having affairs with others.
- The abuser is preoccupied or obsessed with the victim.
- The abuser is isolated from others, and the victim is central to the abuser's life.
- The abuser is assaultive during sex.
- The abuser makes threats to the victim's children.
- The abuser threatens to take the victim hostage, or has a history of hostage-taking.
- The severity or frequency of violence has escalated.
- The abuser is depressed or paranoid.
- The abuser or victim has a psychiatric impairment.
- The abuser has experienced recent deaths or losses.
- The abuser was beaten as a child, or witnessed domestic violence as a child.
- The abuser has killed or mutilated a pet, or threatened to do so.
- The abuser has started taking more risks, or is "breaking the rules" for using violence in the relationship (e.g., after years of abuse committed only in the privacy of the home, the abuser suddenly begins to behave abusively in public settings).
- The abuser has a history of assaultive behavior against others.
- The abuser has a history of defying court orders and the judicial system.
- The victim has begun a new relationship.
- The abuser has problems with drug or alcohol use, or assaults the victim while intoxicated or high.

Rygwelski, above, p. 49-52; Walker, et al, *Domestic Violence and the Courtroom: Understanding the Problem . . . Knowing the Victim*, p. 4 (American Judges Foundation, 1995).

1.6 Abusive Tactics

An abuser's primary motivation is to maintain control over the victim. Abusers are master manipulators who employ physical assault in conjunction with other tactics to achieve their objective. Abusers' tactics have been compared to the brainwashing tactics used against prisoners of war, which include isolation, threats, occasional indulgences, demonstrations of omnipotence, degradation, and enforcement of trivial demands — abusers may employ similar patterns of physical, sexual, financial, and emotional coercion to control their victims. Walker, The Battered Woman Syndrome, p. 27- 28 (Springer, 1984); Graham & Rawlings, *Bonding with Abusive Dating Partners: Dynamics of Stockholm Syndrome*, in Dating Violence: Young Women in Danger, p. 121-122 (Levy, ed., Seal Press, 1991). These tactics prevent victims from leaving abusive relationships. In addition to physical assaults or threats, abusers' control tactics may include:

- **Emotional abuse of the victim**

  Emotional abuse may consist of isolating the victim from family and friends, making degrading remarks to the victim, blaming the victim for the abuse, constantly monitoring the victim's activities, stalking, playing "mind games," threatening suicide if the victim leaves the relationship, and making and enforcing extensive, egregious rules.

- **Using children as vehicles for abuse of the victim**

  Abusers frequently involve the victim's children in their efforts to assert control. Some abusers kidnap, sexually abuse, or physically harm the victim's children, or threaten to commit one of these acts. Others initiate or threaten to initiate court proceedings to remove the children from the victim's home, or use court-ordered parenting time as an opportunity to harass the victim. Abusers may also force children to act as informers against the victim or to deliver threats to the victim.

- **Controlling the finances**

  An abuser may maintain control in a relationship by limiting the victim's access to the couple's money or by preventing the victim from getting or keeping a job. This interference with the victim's economic independence makes financial abuse a major factor in preventing victims from leaving abusive relationships.

- **Sexually abusing the victim**

  This form of abuse includes rape, forced sexual acts, verbal degradation, forced sexual contact in front of the children, threats to find another partner if the victim refuses sex, and injury to the sexual areas of the victim's body. Sexual abuse may also include the abuser's refusal to take appropriate precautions against unwanted pregnancy or sexually transmitted diseases.

Note: Domestic violence victims in same-sex relationships are subject to the same abusive tactics as heterosexual victims. Like heterosexual domestic violence victims, lesbian and gay victims may suffer emotional, sexual, and psychological abuse in addition to physical assault. Like heterosexual abusers, lesbian and gay abusers target particular vulnerabilities of their victims. One commonly exploited vulnerability in same-sex relationships is the victim's fear of being publicly exposed as lesbian or gay. Victims who fear such exposure experience extreme isolation, which prevents them from leaving the violent relationship or from seeking assistance outside of it. Another common vulnerability arises from the HIV infection of one of the partners. In a variation of the notion that "if I can't have you, no one can," an infected abuser may deliberately infect the victim to keep the victim in the relationship. An HIV infected victim may be threatened with public exposure of his or her HIV status or with interference in efforts to obtain medical attention. Elliott, *Shattering Illusions: Same-Sex Domestic Violence,* p. 3-4, and Letellier, *Twin Epidemics: Domestic Violence and HIV Infection Among Gay and Bisexual Men,* p. 72-76, in Violence in Gay and Lesbian Domestic Partnerships (Renzetti & Miley, ed., Harrington Park Press, 1996).

Abusers may extend their controlling tactics to situations within the courtroom. Such tactics may be employed before, during, and after court proceedings to demonstrate control to the victim and to manipulate the court's response to the abuser. The following list gives examples of abusive tactics that court personnel may encounter:

- Physical assaults or threats of violence against the victim, those providing refuge, and others inside or outside the courtroom.
- Threats of suicide.
- Threats to take the children.
- Harassment intended to coerce the victim to dismiss proceedings or to recant previous testimony.
- Following the victim in or out of court.
- Sending the victim notes or "looks" during proceedings.
- Bringing family or friends to the courtroom to intimidate the victim.
- Long speeches about how the victim "made me do it."
- Statements of profound devotion or remorse to the victim and to the court.
- Repeated requests for delays in proceedings.
- Requests for changes of counsel or failure to follow through with appointments of counsel.
- Intervening in the delivery of information from the court to the victim so that the victim will be unaware of when to appear in court.

- Requests for mutual orders of protection as a way to continue control over the victim and manipulate the court.
- Continually testing the limits of parenting time or support arrangements, e.g., arriving late or not appearing at appointed times.
- Threats and/or initiation of custody fights to gain leverage in negotiations over financial issues.
- Initiating retaliatory litigation against the victim or others who support the victim.
- Making false reports of child abuse or neglect by the victim.
- Enlisting the aid of parent rights groups to verbally harass the victim (and sometimes courts) into compliance with demands.
- Using any evidence of damage resulting from the abuse as evidence that the victim is an unfit parent.

From Tennessee Domestic Abuse Benchbook, p. 23- 24 (Tenn. Task Force Against Domestic Violence, 1996). See also Zorza, *Batterer Manipulation and Retaliation in the Courts,* 3 Domestic Violence Report 67 (June/July, 1998).

The court can take steps to intervene in abusive courtroom tactics, as follows:

- Develop a safe place in the courthouse for victims to wait until their case is called. In criminal proceedings regarding felonies or serious misdemeanors, the court should provide a waiting area for the victim separate from the defendant, defendant's relatives, and defense witnesses, if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court should provide other safeguards to minimize the victim's contact with defendant, defendant's relatives, and defense witnesses during court proceedings.

- Call domestic violence cases as early as possible on the court docket or have a docket that is solely for domestic violence cases.

- Communicate from the bench that the court takes evidence of domestic violence seriously.

- Require the alleged perpetrator to remain in the courtroom until the victim has left the building.

- Provide victim with an escort from the courthouse.

- Be alert for multiple court actions or orders concerning the same parties, including conducting checks of the protective order registry.

1.7 Understanding the Victim

This section will explore victims' coping and survival strategies, and the effect that they can have on victims' interactions with the court system.

1.7.1 How Victims Cope With Domestic Violence

Domestic violence victims vary in their survival strategies, depending upon their individual personal characteristics and the nature of the social environment in which they find themselves. Walker, The Battered Woman Syndrome, p. 7-10, 33 (Springer, 1984). They exhibit no specific "personality profile." Some victims may appear to be no different from other people, having adopted behavior that conceals the abuse they suffer. Other victims may appear to engage in "crazy" behavior. Despite appearances of "craziness," most researchers do not believe that domestic violence victims suffer from masochism or other types of psychological disorders; rather, they agree that seemingly "crazy" behavior exhibited by some victims is better understood as a normal survival or coping response to the abuser's "crazy" behavior.

The following discussion lists common survival or coping strategies that victims may display:

- **Minimizing or denying the violence**

  Like abusers, some victims minimize or deny the violence in their lives. Some victims deny or minimize the violence in the abuser's presence or in public settings (such as courtrooms) in order to protect themselves from further retaliatory violence. Victims may also minimize their experiences with violence or their emotional responses to it to survive the emotional trauma they suffer. Douglas, *The Battered Woman Syndrome*, in Domestic Violence on Trial, p. 43 (Sonkin, ed., Springer, 1987). In other circumstances, victims may minimize or deny the violence due to fear of immigration repercussions, limited ability in English, or religious beliefs. Ramos, M.D., Cultural Considerations in Domestic Violence Cases: A National Judges Benchbook §2.34 at p. 2-43 (1999) [hereinafter Ramos, Cultural Considerations].

- **Taking responsibility for the violence**

  Instead of objecting to the violence against them, some victims may blame themselves for it, focusing on their own perceived failings as a cause of the abuse. This attitude may arise because the abuser has convinced the victim to take the blame or because the victim has acceded to the abuser's exercise of control in the relationship. Abusers encourage this response to violence because it reinforces their own efforts to deny responsibility. Rygwelski, *Beyond He Said/ She Said,* p. 25 (Mich. Coalition Against Domestic Violence, 1995).

- **Using alcohol or drugs**

  Domestic violence victims may use alcohol or drugs as a means of numbing the effect of the violence. If the abuser is alcoholic or drug dependent, the victim may be forced to join in the use of these substances to prevent abuse. Some victims receive prescription medication from their physicians as a means to cope with the anxiety

resulting from the abuse. These medications may impair a victim's ability to judge the dangerousness of an abusive situation or to seek protection. Douglas, above.

- **Self defense**

  Domestic violence victims may act to defend themselves or their children. An analysis of data on crimes by current or former spouses, boyfriends, or girlfriends published by the Bureau of Justice Statistics reported that 77% of female victims of nonlethal intimate violence actively defended themselves. Greenfeld, et al, *Violence by Intimates*, p. 19 (Bureau of Justice Statistics, 1998; data collected between 1992-1996). Of these, 43% tried to escape from the offender, called the police or other help, or used other non-confrontational means of self-defense. Thirty-four percent confronted the offender by struggling, shouting, chasing or other means without a weapon (30%) or with a weapon (4%).

- **Religious, cultural constraints**

  If a female victim believes that the male partner must be the dominant figure in a household, she may regard his abuse as an acceptable extension of his dominance. Under this family concept, she may believe that her efforts to escape are inappropriate or that others in her community will ostracize her if she attempts to leave.

- **Seeking help**

  Many domestic violence victims actively seek help, often without success. Some researchers have found that victims' efforts to seek help tend to increase as the danger to themselves and their children increases.

  Other victims may experience cultural pressures not to discuss the abuse outside of their communities, making it difficult for them to seek medical, legal, and other help. Ramos, Cultural Considerations §1.39 at p. 1-33. Moreover, language differences and lack of familiarity with available social and legal services may prevent some victims from seeking help. *Id.* §2.17 at p.2-15.

- **Remaining in the abusive relationship**

  Leaving an abusive relationship can have serious physical consequences for the victim. In response to victims' efforts to leave, many abusers will escalate the physical violence — often to lethal levels — as they seek to reassert control in the relationship. The victim's recent separation from the abuser is a lethality factor. When seen in this light, a victim's "crazy" decision to stay with an abuser makes sense as a survival tactic.

  The threat of death or serious injury upon separation from the abuser is not the only obstacle to leaving a violent relationship. Victims trapped in a violent relationship often face other formidable barriers to escape, including:

- The victim feels that staying in the relationship is best for the children.
- The victim has no employment skills or is financially dependent on the abuser.
- The victim has no housing if she leaves the relationship.
- The victim cannot afford legal assistance with divorce, custody, or protection order proceedings.
- The victim fears the intervention of the court system.
- The victim fears losing custody of children if the violence is reported or revealed in divorce proceedings. Some abusers deliberately give victims misinformation about their legal rights to prevent them from seeking legal recourse.
- The abuser has isolated the victim from the social or family connections that could otherwise provide support after leaving the relationship.
- The victim has accepted the blame for the abuse and is attempting to change in the hope that it will stop.
- The abuser has expressed remorse and promised to change. A victim who loves the abuser will want to believe such promises.
- The abuser has degraded the victim, making statements such as, "You are worthless without me," or "Nobody cares about you but me." Victims who believe these types of statements do not have the self-confidence necessary to escape the violence.

Jones, *Why Doesn't She Leave?* 73 Mich. Bar Journal 896 (1994); Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, Appendix C, p. 20-25, in Lemon, Domestic Violence and Children (Family Violence Prevention Fund, 1995).

Note: Lesbian and gay victims stay in violent relationships for the same reasons as heterosexual victims stay — financial dependence, fear of retaliation, fear of court intervention, and lack of will to resist the violence. Due to society's reluctance to accept same-sex relationships as legitimate, the social isolation that many heterosexual victims feel is often felt more intensely by lesbian and gay victims. Lesbian and gay victims may be reluctant to seek outside intervention in an abusive relationship because they fear discrimination by criminal justice authorities, or public exposure as members of the lesbian or gay communities. For HIV infected victims who are financially or physically dependent on their abusers, leaving the relationship may seem completely impossible. For victims whose abusive partners are HIV infected, leaving the relationship may mean leaving an ill or dying person without a primary caregiver, and facing the disapproval of a circle of friends who may not regard the abuse as a serious problem. Elliott, *Shattering Illusions: Same-Sex Domestic Violence,* p. 5-7, and Letellier, *Twin Epidemics: Domestic Violence and HIV Infection Among Gay and Bisexual Men,* p. 77-78 in Violence in Gay and Lesbian Domestic Partnerships, (Renzetti & Miley, ed., Harrington Park Press, 1996).

1.7.2 Victims in Court

Victims may fail to participate in court proceedings in the following ways:

- Publicly agreeing with the abuser's denial or minimization of a violent incident.
- Avowing love for the abuser.
- Making statements supporting the abuser.
- Fleeing the jurisdiction, along with the children.
- Abandoning proceedings.

Although these actions may seem illogical to observers outside of the violent relationship, they can make sense if they are regarded as survival tactics. Domestic violence victims know their abusers better than anyone else and they choose strategies to minimize injury based on past success. Although the strategies above may be ineffective to end the abuse in the long term, many domestic violence victims are so involved in a day-to-day struggle to preserve their own lives and the lives of their children that they cannot focus on the long range effects of the violence or on the possibility of forging a new life apart from the abuser. Accordingly, they are likely to view the court's intervention only in terms of its immediate effect upon their safety and/or the relationship. Ganley, above, p. 23; Rygwelski, above, p. 26. They are most likely to participate in court proceedings if they perceive some immediate benefit from going forward. The following discussion explores some of the specific concerns that affect domestic violence victims during court proceedings.

- **Coercion**

  Many victims fail to participate in court proceedings due to a legitimate fear of death or injury at the hands of the abuser. Abusers frequently coerce victims to remain silent about the violence, either by injuring them so that they cannot speak or by threatening them with death or injury. Coercive threats may also extend to others who associate with a victim. The following factors may indicate that a victim's failure to participate has been coerced:

  - The victim appears in court with the abuser to request that court proceedings be terminated.
  - One attorney appears in court to act on behalf of both the victim and the abuser.
  - The respondent has a history of past violence.
  - The allegations of violence are serious.

  If any of these factors (or any other suspicious circumstance) is present, the court should consider obtaining more information about the parties' situation before taking action.

- **Ambivalence about the outcome of court proceedings**

  Domestic violence victims desire protection. They also share with the court its purpose to stop the violence. They may, however, be apprehensive about the effects of court proceedings on their relationships, particularly when it comes to abuser accountability. Victims who are not committed to abuser accountability may abandon legal proceedings after the violence has stopped but before the abuser has suffered the legal consequences for it. Some researchers have pointed out that victims may negotiate their safety by threatening criminal prosecution, without intending to follow through. If the threat of prosecution has the effect of stopping the violence, the criminal justice system has succeeded from the victim's point of view, even if it has not meted out punishment to the abuser. Tolman & Edleson, *Intervention for Men Who Batter*, in Understanding Partner Violence: Prevalence, Causes, Consequences, and Solutions, p. 264 (Nat'l Council on Family Relations, 1995).

  Particularly when the abuser faces a jail term, a victim's ambivalence about abuser accountability may stem from concern with family preservation or improvement of the relationship with the abuser. A victim may also be concerned with the potential for financial hardship if the abuser is jailed or for retaliatory violence when the jail term is completed. Despite these legitimate victim concerns, being held accountable in court can be a powerful impetus for an abuser to change. The victim's concerns with abuser accountability can be addressed in the following ways:

  - Stress to all parties concerned that the court is in control of the proceedings, not the victim. In criminal matters, let the alleged abuser and victim know that criminal proceedings are a matter between the defendant and the state, not between the defendant and the victim.
  - Permit work release in appropriate cases.
  - Provide for adequate family support whenever appropriate.
  - Impose immediate sanctions upon violations of court orders restraining violent behavior.
  - If the victim abandons a court proceeding, make it clear to all parties concerned that the court's doors will remain open to offer future protection if necessary. Like any other major life transition, separation from a domestic partner is a process, rather than one specific event. The victim may leave and return to the abuser several times before making a permanent end to the relationship; this process may not succeed unless the court's doors remain open to offer necessary protection. Rygwelski, above, p. 50.

- **Lack of confidence that the court will be effective in stopping the violence**

  A victim's past experience with the justice system may contribute to the perception that it will neither stop the violence nor offer adequate protection from injury. The following factors can erode the victim's confidence:

  - Procedural delays.

- Complex court proceedings.
- Discourteous court employees.
- Misinformation about the court system given by the abuser or uninformed service providers.
- Recurrence of violence despite the issuance of court orders restraining the abuser.
- Failure of law enforcement officers to arrest abusers who violate court restraining orders.
- Failure of prosecutors to prosecute domestic violence offenses.
- Failure of courts to impose appropriate sanctions for domestic violence offenses.

A court can increase its credibility as a resource for domestic violence victims in a number of ways:

- o Maintain the confidentiality of information in court documents that would identify the victim's whereabouts, if the victim is in hiding from the abuser and there is a reasonable apprehension of acts or threats of physical violence or intimidation by the abuser.
- o Provide for expedited proceedings in cases involving domestic violence. Under the Victims of Crime Act, §31-26-1, the victim has a right to "speedy disposition of the case." §31-26-4(B).
- o Provide domestic violence training for court personnel.
- o Provide clear information about court proceedings to unrepresented parties.
- o Treat domestic violence offenses as least as seriously as offenses involving stranger violence.
- o Work with community criminal justice and social service agencies to develop a clear, coordinated policy for domestic violence offenses.

1.8 Domestic Abuse and Children

This section discusses children's involvement in adult domestic violence and its effects on them.

1.8.1 Children's Involvement in Adult Violence

Children are exposed to adult domestic violence in various ways: they witness it; they are used by the abuser to control the victim; and they suffer physical consequences incident to the adult violence.

- **Witnessing the violence**

  Although parents often minimize or deny the presence of children during violent incidents, studies show that up to 90% of children from violent households are aware of the abuse. In New Mexico in 1999, 3,710 children were present at the scene of

19,822 cases of domestic violence as reported by law enforcement. Almost ¾ (74%) of the children who witnessed domestic violence were not yet adolescents (12 years and under). There were 6,687 domestic violence service provider reports that identified 2,545 (38%) domestic violence incidents where children were present at the scene. Additionally, 25% (3,313) of the 13,184 clients served by statewide domestic violence service providers were children. Nationally, more than half of female domestic violence victims live in households with children under age 12, and 4 in 10 offenders in state prisons for crimes against intimates had an average of 2.2 young children residing with them. Caponera, *Incidence and Nature of Domestic Violence in New Mexico: An Analysis of 1999 Data from the New Mexico Domestic Violence Data Central Repository,* p. iv (June 2000).

Children perceive the adult violence in their homes in a variety of ways. They may be eyewitnesses to all or part of a violent incident, or they may catch a fleeting glance of it. They may hear the sounds of abuse — the screaming or crying, the breaking glass, the impact of the blows. Children can also see the victim's tears, along with the blood, bruises, torn clothing, splintered furniture, and broken glass that evidence abuse after an incident has occurred. Finally, children notice the tension between the adults in a violent home — they see their mother jump when her abuser's car pulls in the driveway or when the abuser enters the room. Hart, *Children of Domestic Violence: Risks and Remedies,* Child Protective Services Quarterly (Pittsburgh Bar Ass'n, Winter, 1992); Walker, The Battered Woman Syndrome, p. 59 (Springer, 1984).

- **Using children to control the adult victim**

A common tactic of domestic abusers is to use the children in the household to control the adult victim. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases,* Appendix C, p. 27, in Lemon, Domestic Violence and Children (Family Violence Prevention Fund, 1995). Domestic abusers are likely to:

- Deliberately abuse their adult victims in the presence of the children.
- Interrogate the children about the victim's activities.
- Force the victim to be in the company of a child always.
- Take the child away after a violent episode to prevent the victim from fleeing.
- Threaten violence against the child or against a pet or object that is important to the child.
- Encourage the child to participate in the physical or emotional abuse of the victim.
- Isolate the child along with the victim.

Because domestic violence often escalates when the victim attempts to leave the abusive relationship, the victim's separation from the abuser will not always be sufficient by itself to protect the children from the violence. The following abusive tactics may be employed after a violent couple separates:

- Engaging in lengthy battles over custody or parenting time.
- Detaining or concealing children.
- Abducting the children, or holding them hostage.
- Using parenting time to interrogate the children about the victim or to blame the victim for the separation.
- Using parenting time to abuse the children.
- Demanding unlimited access to the children.
- Making abusive contacts with the victim's home or work place under the pretext of arranging for access to children.

- **Physical consequences of violence for children**

Children living in violent households are at increased risk for suffering bodily injury. In New Mexico, 22% (576) of children victim-witnesses as reported by domestic violence service providers experienced physical abuse from the current offender of the adult victim, and 7% (147) experienced sexual abuse from the current offender of the adult victim. A 1990 study found that as violence against women becomes more severe and more frequent in the home, children experience a 300% increase in physical violence by the male batterer. Caponera, *Incidence and Nature of Domestic Violence in New Mexico: An Analysis of 1999 Data from the New Mexico Domestic Violence Data Central Repository,* p. iv (June 2000). Such injury may be unintentional, occurring incident to the adult violence. Some children are harmed when they intervene to defend or protect a parent victim. Assaults on victims who are holding young children in their arms often result in injury to the children as well as the victims. Children can also be struck by furniture or other objects thrown by adults during a violent incident. Ganley, above, p. 26.

Adult domestic violence can have other devastating physical consequences for children beyond bodily injury. Domestic violence can deprive children of housing, schooling, or medical care. Flight from domestic violence often leads to homelessness among victims and children, and is a primary reason why adolescents run away from home. Richie, *The Impact of Domestic Violence on the Children of Battered Women,* Children's Aid Society Newsletter, p. 3 (Spring, 1992). Because abusers sometimes find victims who are in hiding by obtaining addresses from children's school or health care records, some victims fail to enroll their children in school or seek medical care for them out of fear that the abuser will discover their whereabouts.

Children from violent households can also face dislocation at the hands of the court or child protection system, which may remove them from the victim's care — or terminate the victim's parental rights — due to a "failure to protect" them. Advocates for domestic violence victims assert that the removal of children from the home on this basis is founded on two faulty assumptions, namely: (1) the victim is principally responsible for the safety of the children; and (2) the victim has the power and resources to protect the children. These assumptions overlook the abuser's control of the choice to behave violently toward the victim, and the abuser's deliberate use of physical and psychological tactics to incapacitate the victim. Furthermore, these

assumptions reinforce abusive behavior by placing the blame for it on the victim, thus allowing the abuser to escape responsibility for the negative consequences of the violence. Victim advocates suggest that a more effective way to protect children from adult violence is to protect the abused parent by intervening in the abuser's patterns of power and control and insisting that the abuser take responsibility for the violence. Zorza, *Batterer Manipulation and Retaliation in the Courts,* 3 Domestic Violence Report 68, 75 (June/July, 1998); Jackson, *Intervention with Children Who Have Witnessed Abuse,* p. 3-4 (House of Ruth, Baltimore, MD, 1996).

1.8.2 Effects of Adult Violence on Children

Whether they witness the abuse or are abused themselves, children suffer from involvement with adult domestic violence. In addition to causing physical injury, domestic violence can have a profound impact on children's core beliefs about themselves, those in authority, and those with whom they have intimate relationships. The trauma and anxiety it produces can impede children's development by preventing them from forming healthy emotional attachments with others, and by derailing their efforts to learn basic social skills. This devastating emotional, cognitive, and behavioral damage can be manifested even after a child reaches adulthood. The following discussion explores some specifics of these effects. Jackson, above, p. 4-5; Ganley, above, p. 28-29.

- **Emotional effects**

  Domestic violence terrorizes children. Once a violent incident has occurred, children may experience pervasive anxiety that another attack is imminent. They may feel rage at both the abuser and the victim, or confusion, guilt, shame, and helplessness. If the family is separated as a result of the abuse, children often experience grief and depression. See Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse,* 39 Social Work 51, 52-53 (1994), and Crites & Coker, *What Therapists See That Judges May Miss,* Judges' Journal, 9, 11-12 (Spring, 1988).

- **Cognitive effects**

  Domestic violence teaches children that violence is normal, effective behavior. Children in violent homes with a heterosexual male abuser learn that men are aggressive and domineering, while women are powerless and deserving of abuse. They learn that they and their mothers are worthless, and that adults cannot be trusted. Children in violent homes may learn to equate caring with abuse. They frequently believe that they are to blame for the abuse, particularly if the parental conflict involves child care issues. This belief is reinforced when the abuser tells the children that the victim deserves the abuse, or that it is occurring for their own good. If children are threatened or punished when they disclose the violence in their homes, they may learn to be deceptive and indirect in their communication with others.

- **Behavioral effects**

  Domestic violence can cause developmental delays in children. Children in violent households may experience delayed development of speech, motor, and cognitive skills. Anxiety over their family situation may interfere with their ability to function in school or cause learning disabilities. They may also develop somatic complaints, such as insomnia, diarrhea, bedwetting, or frequent illnesses. Some children experience eating or sleeping disorders, withdrawal, over-compliance, clinginess, aggression, destructive rages, detachment, regressive behavior, a fantasy family life, or thoughts of suicide.

  A few children turn to violent behavior themselves as a result of observing adult domestic violence. Sixty-three percent of all males between ages 11 and 20 who are imprisoned for homicide in this country killed their mother's batterer. An Oregon study reported that 68% of the delinquent youth in treatment programs had witnessed their mother's abuse and/or had been abused themselves. These youth had committed such crimes as arson, assault, rape, and murder. Ninety percent of the youth within the group were abusing alcohol, and 89% were abusing drugs. A 1985 Massachusetts study found that children who witnessed the abuse of their maternal caretaker were:

  - 24 times more likely to commit sexual assault crimes.
  - 50% more likely to use drugs and/or alcohol.
  - 74% more likely to commit crimes against another person.
  - 6 times more likely to commit suicide.

  Studies cited in Edwards, *Reducing Family Violence: The Role of the Family Violence Council*, 43 Juvenile and Family Court Journal 1 (1992), and Jackson, above, p. 5.

- **Effects on adult behavior**

  Children carry the effects of domestic violence into their adult lives. The failure to acquire normal academic or interpersonal skills in childhood may adversely impact an adult's abilities to maintain a job or an intimate relationship. Moreover, children — especially males — who have witnessed domestic violence in their homes are at increased risk for perpetuating abuse in the families they form as adults. In one study, men who had seen their parents physically attack each other were three times more likely to hit their wives than those who had not. *The Effects of Women Abuse on Children*, p. 11-12 (2d ed., Nat'l Center on Women & Family Law, 1994).

1.9 Ethical Concerns with Judicial Participation in a Coordinated Community Response

Judges may find it valuable to participate in or even organize a vehicle for coordinating the response of governmental and nongovernmental domestic violence services providers in their communities. Some communities within New Mexico and across the country have

established domestic violence coordinating councils to bring together courts, probation services, domestic violence shelters, anger management therapists, prosecuting and defense attorneys, law enforcement, and others involved in assisting treatment programs and victim protection efforts. Councils address such issues as efficiency of services, avoiding duplication, and exchanging information about services and problems, among other issues.

A judge who wishes to participate in coordinated planning efforts with other community providers of domestic violence services should do so, but must be careful to observe limitations imposed by the New Mexico Code of Judicial Conduct, as it has been interpreted by opinions of the Advisory Committee on the Code. These limitations are primarily aimed at preventing any actions undermining the appearance of judicial impartiality, or of lending the prestige of judicial office to support private interests. In particular, the Advisory Committee has emphasized in analogous situations the importance of avoiding service on boards where the organization or its members or clients are likely to appear before the judge with any degree of frequency.

Please note that the following discussion is intended as a general guide to ethical issues that a judge should consider before participating in a domestic violence coordinating council or similar effort. It is not an authoritative advisory opinion on which a judge may rely. Whether or not a judge may participate in such efforts will vary with on the circumstances of each situation. A judge should consult the Advisory Committee on the Code of Judicial Conduct before engaging in any undertakings that may be questionable under the Code.

The New Mexico Coalition Against Sexual Assault has created a legal judicial committee that includes judges as members, but not officers. The mission statement of the committee has been carefully crafted to avoid ethical conflicts for the participating trial judges and may serve as a model for other communities:

> Legal Judicial committee will meet for the purposes of (1) Information exchange with members (2) Having a better understanding of the operational activities of each organization (3) Taking a critical look at the systemic issues within the legal judicial system and identify problems (4) Developing information to provide to the coalition with the ultimate goal of improvement of the legal judicial system (i.e., Legislative education and awareness).

A judge's participation in a domestic violence coordinating council is subject to the general constraints on participation in extra-judicial activities set forth in the Code of Judicial Conduct:

> **21-500. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.**
>
> A. **Extra-judicial activities in general.** A judge shall conduct all of the judge's extra-judicial activities so that they do not:
>
> (1) cast doubt on the judge's capacity to act impartially as a judge;
>
> (2) demean the judicial office;

(3) interfere with the proper performance of judicial duties . . . .

Paragraph C of §21-500 limits the judge's ability to "consult with an executive . . . body or official" to situations where the matters under consideration concern "the law, the judiciary or matters relating to the judiciary or which affect the interests of the judiciary, the legal system or the administration of justice." While a judge's participation in a coordinating council could be construed as "consulting" with any public officials who would almost necessarily serve on such a body, the breadth of this exception would seem to allow the judge's service so long as other requirements of the Code were satisfied. As found in an opinion issued by the New Mexico Advisory Committee on the Code of Judicial Conduct in Advisory Opinion 86-4:

> A judge may serve as a member or officer in a council on crime and delinquency as long as the prestige of office is not used for the benefit of the organization.

Indeed, judges are not only permitted, but encouraged by the Code to engage in civic activities that enhance the administration of justice, to the extent the judge's time permits:

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law *and improvement of criminal and juvenile justice*. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law.

Code of Judicial Conduct, official commentary to §21-500(B) [emphasis added].

Even if a domestic violence coordinating council or similar entity is or appears to be a governmental or non-profit organization, a judge may participate as an officer or director of the organization so long as the judge acts within the limits of the Code, §21-500(C):

> (3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and other requirements of this Code:
>
> (a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:
>
> (i) will be engaged in proceedings that would ordinarily come before the judge; or
>
> (ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

In this regard, the Advisory Committee on the Code of Judicial Conduct has noted the impropriety of a judge's service on the board of a domestic violence *shelter*:

> A judge should not serve as the president of the board of directors of a shelter for victims of domestic violence. Although the board has no fund-raising responsibilities, limits its activities to approving budget items and has no access to the names of those served by the charity, service on this committee would create the appearance of impropriety and cast doubt on the judge's impartiality. The charity is organized to shelter victims of domestic violence, and these persons are likely to appear in court. The defendants in such actions could reasonably believe that the judge knew the victim or that the judge was biased in favor of the victim.

Advisory Opinion 88-7.

The Advisory Committee has expressed its opinion that a judge may serve on the board of a non-profit organization that provides psychological and emotional support for crime victims, so long as the organization or individuals receiving its services would not be likely to appear in front of that judge, and other requirements of the rule were satisfied. Advisory Opinion 98-05. On the other hand, Advisory Opinion 96-06 stated that a Child Support Hearing Officer may not serve as a member of a Court-Appointed Special Advocates program whose volunteers would appear regularly before the court of which the hearing officer was a part, even though the CASA volunteers did not ordinarily appear before the hearing officer herself.

The Advisory Committee has further recommended against service by a judge on a board of a neighborhood association that identified itself as a "non-profit statewide advocacy organization serving as a voice for children, youth and families and those who love them," where the organization's services included funding programs concerning community patrolling, landlord training, and enforcement of nuisance abatement laws. The organization also was "involved in DWI legislation, compliance checks on outlets selling tobacco to youth, and the shutdown of drug houses." The Advisory Committee noted that the organization or its members, or persons that they advised, or persons charged with violations of the law as a result of the organization's activities, might appear before the judge. Similarly, the judge's impartiality could be called into question since the judge might be called upon for advice to the organization, which might itself become a potential litigant before the judge. The committee felt that these conflicts would violate [Rule] 21-500(A) and (C).

The judge thus must avoid service in any capacity to an organization that could cast doubt on the judge's impartiality. In particular, the judge must avoid service altogether to an organization that may appear, or whose members or clients may appear, before that judge or the court of which the judge is a part. Judges must also carefully limit any involvement in fundraising to conform to subparagraph (b) of §21-500(C)(3). But while these and similar considerations must be kept in mind and the ethical rules adhered to, this caution need not prevent a judge's service on a domestic violence coordinating council or similar entity whose purposes are properly limited, like the Legal Judicial committee above appears to be.

The underlying support of the Code for judicial involvement in such planning activity lies in the value of such service to the administration of justice. If a community coordinating council can improve the safety of victims, provide the court with more accurate and thorough information on which to base its rulings, provide better opportunities for appropriate treatment referrals, or help various service organizations coordinate their services to allow greater efficiency, faster response times and greater compatibility among treatment and protective services, then the judge's careful participation in such an effort should be consistent with the letter and spirit of the Code of Judicial Conduct.

CHAPTER 2

CIVIL ORDERS OF PROTECTION: ISSUANCE

This chapter covers:

- Overview of orders of protection in domestic violence cases.
- Provisions of the Family Violence Protection Act.
- Jurisdiction and venue.
- Relief available through an order of protection.
- Ex parte and temporary orders of protection.
- Pretrial issues.
- Trial issues.

2.1 Introduction

In New Mexico, orders of protection are issued under the Family Violence Protection Act, §40-13-1. The Supreme Court has adopted official, uniform forms to be used for the process of applying for and issuing orders. Supreme Court Forms 4-961 et seq.

Orders of protection are recognized as a powerful tool to reduce violence against current or former intimates. They are particularly helpful when swiftly and effectively enforced. While orders of protection do not always stop the violence, in the majority of cases they have proved effective in reducing or eliminating further abuse.

The most effective strategies for ensuring the safety of the abused party and children include a comprehensive plan that limits the perpetrator's power and control over the victim. Orders of protection can address the perpetrator's access to the abused party, custody and visitation, economic support, restitution, and rehabilitation of the perpetrator. Thus, they can play a powerful role in preventing further domestic violence.

Studies show that victims of domestic violence are particularly vulnerable to reassault, and even homicide at the time they attempt to separate from the abuser. See *State ex rel Schwartz v. Sanchez*, 1997-NMSC-21, at ¶ 9, pp. 3 – 4; E. Stark, A. Flitcraft, D. Zuckerman, A. Grey,

J. Robuson, & W. Frazier, *Wife Abuse in the Medical Setting*, Office of Domestic Violence, U.S. Department of Health and Human Services (Washington, D.C., 1980); P. A. Langan & C.A. Innes, *Preventing Domestic Violence Against Women*, Bureau of Justice Statistics Special Report (Washington, D.C., U.S. Department of Justice, 1986, p.1).
Many domestic violence homicides occur when the abused party is in the process of separating from the abuser. A common misconception regarding domestic violence is that the violence will stop once the abused party leaves the relationship, and therefore issuance of orders of protection after separation is unnecessary. Studies show that in fact a perpetrator often increases the violence after separation in an attempt to coerce the abused party to return, or in retaliation for the separation. According to the National Institute of Justice, 75% of the domestic assaults reported to law enforcement agencies occur when the abused party is already divorced or separated from the abuser. U.S. Department of Justice, *Report on the Nation on Crime and Justice: The Data* (Washington, D.C. Government Printing Office, 1983). For this reason, orders of protection can be particularly effective in preventing further violence after separation of the parties.

A study conducted by the National Institute of Justice in 1990 found:

> *With thousands of victims petitioning for protection orders, judges have a unique opportunity to intervene in domestic violence cases. For those victims who petition early, as violence begins to escalate, judges can structure needed protection before such crime can lead to serious injury or death . . . .*

Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice and Enforcement,* at p. 1, National Institute of Justice, March 1990, at p. 2. (Subsequently cited as N.I.J. C.P.O. Study.)

2.2 Overview of Orders of Protection

2.2.1 Purpose

Orders of protection have emerged as an accessible and effective justice system response to family violence. National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice,* Reno, Nevada, 1990, at 22. (Subsequently cited as NCJFCJ.) They can play a critical role as part of a comprehensive plan designed to protect victims from continuing violence in the home.

> *Civil protection orders . . . offer judges a unique additional tool for responding to the special difficulties of domestic violence cases. When properly used and enforced, protection orders can help prevent specific behaviors such as harassment or threats which could lead to future violence. They also can help provide a safe location for the victim, if necessary, by barring or evicting an offender from the household, and establish safe conditions for any future interactions, for example, supervised child visitation . . . .*

N.I.J. C.P.O. Study at 1.

Orders of protection can play a powerful role in the court's ability to meet the following goals of court intervention in domestic violence cases:

- Stop the violence.
- Protect the abused party.
- Protect the children and other family members.
- Protect the general public.
- Hold the perpetrator accountable for the violent behavior and for stopping that behavior.
- Rehabilitate the perpetrator.
- Provide support and restitution for the abused party and the children.
- Convey to the public that domestic violence will not be tolerated.

2.2.2 Effectiveness

Civil orders of protection, when properly drafted and enforced, are effective in eliminating or reducing domestic abuse. N.I.J. C.P.O. Study at p. 1; Lerman, "A Model State Act: Remedies for Domestic Abuse," *Harvard L Journal on Legislation*, 1984, 21(1), p. 70, n.35; Lenore Walker, *The Battered Woman*, Harper and Row, 1979; Grau, Fagan & Wexler, "Restraining Orders for Battered Women: Issues of Access and Efficacy," *Women and Politics*, 1984, pp. 13-28. Swift enforcement of protective orders is essential to their effectiveness. Research demonstrates that men stop battering women partners to the extent that they perceive that penalties for further violence will be both certain and severe. Carmody, D.C. & Williams, K.R., 1987, "Wife Assault and Perceptions of Sanctions." *Violence and Victims*, 2; Jaffe, P., Wolfe, D.W., Telford, A. & Austin, G., 1986, "The Impact of Police Charges in Incidents of Wife Abuse," *Journal of Family Violence*, 1, [1]; Hart, B. 1990, *Violent No More: Intervention Against Wife Abuse in Ohio*, Ohio Domestic Violence Network; Attorney General's Family Violence Task Force of Pennsylvania, *Domestic Violence: A Model Protocol for Police Response*, Harrisburg, PA: Office of the Attorney General, January, 1989. The utility of orders of protection often depends on whether they provide the requested relief in specific detail.

> *Judges . . . stress that each type of relief provided must be fully explained in the order. . . . Providing precise conditions of relief makes the offender aware of the specific behavior prohibited. A high degree of specificity also makes it easier for police officers and other judges to determine later whether the respondent has violated the order. . . .*

N.I.J. C.P.O. Study at 33.

2.2.3 Constitutionality

While New Mexico has not specifically addressed the constitutionality of statutes authorizing the issuance of domestic violence protection orders, the constitutionality of such statutes in general has been repeatedly upheld. See, e.g., *Schramek v. Bohren*, 429 N.W.2d 501 (Wisc.

1988) (spousal abuse statute is not unconstitutional since it does not restrict respondent's free speech rights or violate equal protection or due process); *Marquette v. Marquette*, 686 P.2d 990 (Ok. 1984) (ex parte order barring communication with wife and denying visitation does not violate due process where deprivation for short period of time and state has interest in protecting abuse victims); *Sanders v. Shephard*, 541 N.E.2d 1150 (Il. 1989) (ex parte protective orders do not violate due process); *Boyle v. Boyle*, 12 D & C 3d 767 (Pa. 1979) (valid exercise of police powers in a reasonable manner to abate a well recognized and widespread social problem); *Cobb v. Cobb*, 545 N.E.2d 1161 (Ma. 1989) (protective orders issued ex parte do not violate procedural due process or free speech where deprivation was only for short period of time and state had interest in securing abused party's immediate protection); *In re Marriage of Hagaman*, 462 N.E.2d 1276 (Il., 1984) (statute prohibiting "abuse" not unconstitutionally vague. Definition of abuse encompasses a broad variety of conduct. Civil standard for vagueness, not criminal, applies.)

2.2.4 Independent Actions for Protection Orders

The vast majority of jurisdictions, including New Mexico, allow the filing of a civil protection order action independent of any other family or criminal law action. *See* §40-13-3. In a few states the protection order may be filed in a criminal case and in other states it may be filed as part of a pre-existing family action. New Mexico does not provide for issuance of orders of protection as such in criminal cases, but allows courts to include no contact provisions in criminal orders.

2.2.5 The Role of the Domestic Violence Commissioners

Effective July 1, 2005, the Family Violence Protection Act has been amended to modify and clarify Rule 1-053.1 of the Rules of Civil Procedure. S. 447, 47th Leg., Reg. Sess. (N.M. 2005). The new section authorizing appointment of domestic violence commissioners defines how domestic violence commissioners work within district courts.

Under this section, domestic violence special commissioners shall:

- Review petitions for orders of protection and motions to enforce, modify, or terminate orders of protection;
- If deemed necessary, interview petitioners. Any interviews shall be on the record;
- Conduct hearings on the merits of petitions for orders of protection and motions to enforce, modify, or terminate orders of protection; and
- Prepare recommendations to the district court regarding petitions for orders of protection and motions to enforce, modify, or terminate orders of protection.

The statute and the rule empower domestic violence commissioners to hear and review evidence and to make recommendations to the district judge, but do not allow commissioners to issue orders themselves. Rather, "[a]ll orders must be signed by a district court judge before the recommendations of a domestic violence special commissioner become effective." S. 447, §2, 47th Leg., Reg. Sess. (N.M. 2005); see also Rule 1-053.1(C). The requirement of a judge's signature is intended to protect the due process rights of the parties. As the Court

of Appeals has emphasized, the judge's signature is not ministerial: a judge must conduct some review before signing an order recommended by a special commissioner in order to satisfy the constitutional requirement of due process. *Lujan v. Casados-Lujan*, 2004-NMCA-36, 135 N.M. 285 (2003). Although the Court did not define the scope of the review necessary to satisfy the Constitution, it expressed "grave concern" over the allegation that judges automatically sign orders recommended by special commissioners. *Id.* at ¶19.

2.3 Family Violence Protection Act Provisions

2.3.1 Who May Petition for an Order of Protection

The Family Violence Protection Act authorizes a "victim of domestic abuse" to petition the court for an order of protection. §40-13-3(A). "Domestic abuse" is defined as a specified incident by a household member against another household member. §40-13-2(C); see §2.3.4 below. Therefore the victim of domestic abuse must be a "household member," defined in §40-13-2(D) as one of the following:

- Spouse
- Former spouse (regardless of the length of time that has elapsed since divorce or whether the spouses had children in common)
- Family member, including a:
    - Relative
    - Parent
    - Present or former stepparent
    - Present or former in-law
    - Child
    - Co-parent of a child
- Person with whom the victim has had a continuing personal relationship.

Cohabitation is not necessary for a person to be considered a household member. §40-13-2(D).

Note that because a child is considered to be a household member, a parent or legal guardian can petition for an order of protection on behalf of a child against an abusing household member.

An incompetent adult or a minor may bring an action by next friend or guardian *ad litem*. Rule 1-017. Unlike in some other states, however, an adult may not file on behalf of another adult absent such circumstances.

A law enforcement officer may assist the petitioner in obtaining an *ex parte* emergency order of protection under certain circumstances. Apart from those limited circumstances, the Act does not allow law enforcement officers to file on behalf of victims or potential victims.

2.3.2 Who May Be Subject to an Order of Protection?

Again, because "domestic abuse" requires a particular action by a household member against another household member, §40-13-2(C), to be subject to an order of protection, the abuser must be one of the household members enumerated in §40-13-2(D):

- Spouse
- Former spouse (regardless of the length of time that has elapsed since divorce or whether the spouses had children in common)
- Family member, including a:
    - Relative
    - Parent
    - Present or former stepparent
    - Present or former in-law
    - Child
    - Co-parent of a child
- Person with whom the abuser has had a continuing personal relationship

A child can be the abusing household member and therefore an order of protection may be issued against a minor. Issuance of such an order raises two questions that have yet to be answered by case law or statute in New Mexico:

1. How is the order enforced?
2. Who is responsible for the child if he or she is restrained from living at the parents' home?

See generally *Lucero v. Pino*, 124 N.M. 28, 946 (Ct. App. 1997) (suggesting that order of protection issued against minor without guardian ad litem or counsel may be voidable).

2.3.3 Specific Persons Protected

- **Parents of a child in common**

  §40-13-2(A) affords protection to co-parents, defined as persons who have a child in common regardless of whether they have been married or lived together at any time.

- **Unmarried persons of different genders living as spouses**

  Persons living as spouses are entitled to protective orders as household members in New Mexico under the definition of household member in §40-13-2(D): "a person with whom the petitioner has had a continuing personal relationship." Cohabitation is not necessary to be deemed a household member.

- **Intimate partners of the same gender**

  Gay and lesbian partners are similarly covered by the protective order statute of New Mexico. §40-13-2(D) includes a person with whom the petitioner has had a continuing personal relationship, with or without cohabitation.

- **Dating relationships**

  New Mexico's statute provides protection to "intimate sexual partners," dating relationships and similar relationships. See §40-13-2(D).

- **Persons offering refuge**

  Although some states allow issuance of orders of protection on behalf of persons who offer an abused family member refuge, New Mexico's statute does not (unless they are otherwise household members).

- **Other household members**

  The statutory definition of "household member" in §40-13-2(D) is quite broad, using language that includes petitioner's former spouse or in-laws, "a relative," or "a person with whom the petitioner has had a continuing personal relationship." One can even be a household member without having lived in the same house, since "cohabitation is not necessary." While probably the definition of household member is not broad enough to encompass a long-term roommate or boarder with no personal relationship to the petitioner, one can visualize a very broad circle of people covered by this Act.

2.3.4 Grounds for Issuance of a Civil Protection Order

Statutory Grounds

In New Mexico "domestic abuse" which provides grounds for an order of protection is defined as "any incident by a household member against another household member resulting in: physical harm, severe emotional distress, bodily injury or assault, a threat causing imminent fear of bodily injury, criminal trespass, criminal damage to property, repeatedly driving by a residence or workplace; telephone harassment, stalking; harassment or harm or threatened harm to children as set forth in the paragraphs of this subsection." §40-13-2(C).

Criminal Acts

Many criminal acts provide the grounds for orders of protection. Crimes identified among the list of acts constituting "domestic abuse," §40-13-3.2(C), if committed against a family member, may give rise to orders of protection. This can be true whether or not an arrest is made or the case is prosecuted.

Criminal acts in domestic violence cases which provide grounds for issuing orders of protection include: assault, battery, criminal sexual penetration, kidnapping or restriction of the victim's movement, child abuse, destruction of property, threats, harassment, stalking, reckless endangerment, and disorderly conduct. Sexual assault or "marital rape" would fall within several categories of conduct constituting domestic abuse for the purpose of issuing an order of protection, e.g., §40-13-2(C) (1), (2), (3) and (4).

Interference with Personal Liberty

Domestic abuse can include kidnapping, forceful detention, moving a person a substantial distance from the vicinity where that person was found, compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage.

Threats and Attempts to Harm

Threats to do violence or bodily harm or actions which place a family member in fear of imminent physical injury are sufficient to support the issuance of a protective order in New Mexico, §40-13-2(C)(4). An attempt that causes severe emotional distress or that constitutes a threat would also provide the basis for an order. *Id.*

Harassing Behaviors

Harassment, telephone harassment, stalking, repeatedly driving by residence or workplace and tormenting can be grounds for issuance of a protective order, §40-13-2(C).

New Mexico law defines harassment as follows:

> "Harassment consists of knowingly pursuing a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and that serves no lawful purpose. The conduct must be such that it would cause a reasonable person to suffer substantial emotional distress."

§30-3A-2.

"Stalking" is defined at §30-3A-3:

Stalking consists of a person knowingly pursuing a pattern of conduct that would cause a reasonable person to feel frightened, intimidated or threatened. The alleged stalker must intend to place another person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint or the alleged stalker must intend to cause a reasonable person to fear for his safety or the safety of a household member. In furtherance of the stalking, the alleged stalker must commit one or more of the following acts on more than one occasion:

(1) following another person, in a place other than the residence of the alleged stalker;

(2) placing another person under surveillance by being present outside that person's residence, school, workplace or motor vehicle or any other place frequented by that person, other than the residence of the alleged stalker; or
(3) harassing another person.

Emotional Abuse

§40-13-2(C) provides for issuance of an order of protection when an incident by one household member against another results in "severe emotional distress."

Damage to Property and Criminal Trespass

Criminal damage to property is grounds for issuing a protective order, as is criminal trespass, §40-13-2(C)(6) and (5). Although the Family Violence Protection Act includes criminal damage to property in its definition of domestic abuse when committed by one household member against another, §40-13-2, the Court of Appeals has held that a spouse cannot be charged with criminal damage to property when the property damaged was owned by the marital community. *State v. Powels*, 2003-NMCA-090, 143 N.M. 118, ¶ 5 (holding that husband's destruction of wife's vehicle, which was owned as community property, does not satisfy the criminal damage to property statute because community property cannot be considered the "property of another"). While criminal damage to community property thus cannot provide the basis for finding domestic abuse, *Powels* does not address whether a spouse can commit criminal damage to property when the property is separately owned. Moreover, *Powels* does not apply to criminal damage to property owned by any household members other than a spouse. Finally, *Powels* does not address the Family Violence Protection Act at all and does not prevent a court from considering a spouse's damage of property as assaultive, threatening conduct.

2.4 Jurisdiction and Venue

2.4.1 Subject Matter Jurisdiction

Subject matter jurisdiction over requests for orders of protection in family violence cases is dependent upon the occurrence of an incident of domestic violence in the state or the presence of a danger to the petitioner in the state whether or not incidents of violence occurred within the jurisdiction.

An offense is considered to have occurred in the state if any part or element of the crime was committed in the state. See, e.g., *Adair v. United States,* 391 A.2d 288 (D.C. 1978)*; United States v. Baish,* 460 A.2d 38 (D.C. 1983); *Anthony T. v. Anthony J.,* 510 N.Y.S.2d 810 (N.Y. 1986) (telephone harassment initiated outside but received in the state could serve as basis for protective order); *Pierson v. Pierson,* 555 N.Y.S.2d 227 (N.Y. 1990) (perpetrator's return to New York and his presence and service in New York presented a risk of violence to petitioner although the acts of violence occurred outside the state; had the appellant remained in Florida the risk of continued family violence would have dissipated). See also R.I. Gen.

Laws §15-15-2(d) (1982) (no minimum residency requirement so abused party who flees to another venue for shelter may seek relief in judicial district where temporarily located).

2.4.2 Personal Jurisdiction

Personal jurisdiction over the domestic violence perpetrator is based on the fact that an act was committed which caused a tortious injury in the state. Jurisdiction lies in any state where any part of the act occurred, whether or not any of the parties actually reside there. New Mexico courts may have jurisdiction under the long-arm statute, §38-1-6(A)(3) and (C), to issue orders of protection against respondents living in other states for acts arising from torts they have allegedly committed within the state. Due process requires that the respondent have minimum contacts with New Mexico "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Cronin v. Sierra Medical Center*, 2000-NMCA-082, ¶ 21 (citations and internal quotation marks omitted). Jurisdiction may be obtained through personal service outside the state. §38-1-16(B).

Courts in other states have found jurisdiction over domestic violence respondents residing on military and other federal installations within the state's borders. See, e.g., *Tammy S. v. Albert S.*, (N.Y., 1978) 408 N.Y.S.2d 716 (court has jurisdiction over the residents although they lived in a federally owned installation); *Cobb v. Cobb*, 545 N.E.2d 1161 (Ma. 1989) (wife's status as a member of Armed Forces residing and working at a military installation in an area ceded to the federal government did not preclude the issuance of protective order. Further, protective order was effective in the ceded area, absent any indication that order interfered with federal function).

2.4.3 Venue

Venue is in the district court of the county where the petitioner or respondent resides, or where the cause of action originated, §38-3-1(A), whether in the original action or in an enforcement action. But note the discussion below on affording full faith and credit to protection orders.

2.4.4 Filing Deadlines

The Act places no limitation on the time within which an abused party must file for a protective order. Even prolonged delay in filing need not necessarily preclude the filing or granting of a petition. Because, however, the Act contemplates that the petitioner is in need of immediate protection because of imminent danger, some courts adopt a general policy of not issuing orders when the petitioner seeks relief after significant time has elapsed since the incident. Exceptions to that policy would include situations where the petitioner has delayed filing because she been in hiding or hospitalized. Even in courts that have adopted such a policy, the question whether such a significant amount of time has passed (without valid justification) that an order of protection is no longer necessary is a question of fact that should be resolved by a judge or special commissioner, not by a court clerk.

2.5 Relief Available through a Protection Order

2.5.1 Broad Judicial Authority to Provide Relief and Protection

§40-13-5(A)(7) provides broad authority to the court to protect the petitioner or other household member against abuse by the petitioner. Beyond that, the section provides authority to protect the economic well-being of the petitioner and dependents. The court's orders may be directed toward the respondent as well as law enforcement agencies.

> "Judges should provide all relief that the victim needs given the particular circumstances of the case."

NCJFCJ at 21-22.

> "To be effective both temporary and permanent protection orders must include all statutorily authorized protection against future abuse given the needs of the victim. Victims of domestic violence need a high level of protection if they are to be able to live a life safe, separate and apart from their batterer because the batterer typically has ready access to his victim."

N.I.J. C.P.O. Study at 33.

Standardized Domestic Violence form 4-965, Standard simplified order of protection, includes a list of remedies the court should consider for the protection of the petitioner. The following checklist may also be helpful in for the court in ensuring that all needed protection has been afforded.

2.5.2 Checklist of Relief Available

RELIEF	STATUTORY AUTHORITY	CASE LAW
No further abuse • to petitioner • to children • to other household members	§40-13-5(A)	
Stay away/no contact with provisions • petitioner • child(ren) • other household members • other locations frequented by petitioner (e.g., work, church, etc.)	§40-13-5(A)(2)	

No contact orders, including • personal • telephonic • by third parties acting on behalf of respondent • by mail • by electronic mail	§40-13-5(A)(3)	
Orders to vacate • not re-enter • surrender keys • not damage premises or petitioner's property • not shut off utilities or discontinue mail delivery	§40-13-5(A)(1)	
Orders concerning personal property • disposition • order party not to take, convert, sell, damage, destroy, transfer, or encumber property • use of automobile • police standby to retrieve belongings	§40-13-5(A)(4)	
Orders concerning weapons	18 U.S.C.A. 922 (g) (8)	
Orders for abuser to obtain treatment* • batterer's counseling • substance abuse treatment and testing	§40-13-5(A)(6)	
Orders concerning custody	§40-13-5(A)(2) and (C)	*Lucero v. Pino*, 124 N.M. 28, 946 P.2d 232 (Ct App. 1997)
Orders concerning visitation • supervised visitation • parenting classes for the perpetrator	§40-13-5(A)(2) and (C)	
Orders for monetary relief • child support • spousal support • out-of-pocket losses • medical expenses • counseling expenses • cost of seeking temporary shelter • replacements or repairs	§40-13-5(A)(2), (4), (5)	

• *lost wages • other monetary relief		
Orders for police assistance • serve notice • arrest for violations • assist with vacate orders • police standby procedure	§40-13-1 et seq.	

*Effective July 1, 2001; House Bill 130, New Mexico Legislative Session 2001.

Some further explanation of these provisions follows.

1. "No further abuse" clause.

a. Toward petitioner.

The no abuse provision in the protective order prohibits all forms of domestic abuse as enumerated by the Family Violence Protection Act.

See §40-13-5 (court is to set forth specifically what respondent is to do or refrain from doing.) The standardized state orders specifically require respondent to refrain from committing any acts enumerated as domestic abuse in §40-13-2(C), including physical harm to petitioner or the children, harassment, threats, criminal trespass or damages, stalking, etc. Standardized Domestic Violence Form 4-965, item #4, "Domestic Abuse Prohibited," 2/27/01.

b. Toward petitioner's children and other household members.

The Family Violence Protection Act explicitly authorizes courts to offer protection for petitioner's children, family members and household members as part of the protective order, where they are part of the perpetrator's pattern of abuse. §40-13-5(A). Many courts also rely on inherent powers of the court to protect the children.

2. "Stay away" provisions.

a. From places frequented by the petitioner, the children, and other family and household members.

The Act allows the court sufficient authority to order that the respondent stay away from places that the petitioner, the children, or other family and household members frequent. This includes the petitioner's person, place of employment, school, church, children's school/day care center/babysitter, homes of other family members, or

petitioner's home. §40-13-5(A)(7); Standardized Domestic Violence Form 4-965, item #5, "Contact Prohibitions," 2/27/01.

b. Where the petitioner is in hiding, the court should order the respondent to stay away from the petitioner's residence without revealing its location.

In such instances, the court may additionally order the respondent not to attempt to discover the location of the petitioner's residence and not to enlist the assistance of others in locating the petitioner, id. and item #10, "Parties Shall Not Cause Violation."

c. The court must specify a minimum distance that respondent must keep from petitioner when a stay away order is issued.

The New Mexico standardized Order of Protection requires the Court to specify the minimum distance that Respondent must keep away at Petitioner's home or work, or in public places, Standardized Domestic Violence Form 4-965, item #5, "Contact Prohibitions," 2/27/01.

3. No contact provisions.

a. With petitioner.

In cases where the court wishes to prevent continued harassment and threats towards the petitioner, the court should include within the no contact orders that there be no telephone calls or visits to the petitioner's home, work or other location. §40-13-5(A)(3); Standardized Domestic Violence Form 4-965, item #5, "Contact Prohibitions," 2/27/01. The standardized form includes an exception allowing contact in the event of medical emergencies involving the parties' children, or for joint counseling at the discretion of the counselor, *id.*

"[Judges must be]…careful to specify no telephone contact in the order – including calls to the victim's workplace. The need for identifying the victim's workplace is important to prevent misunderstanding by the respondent or the police. For example, one batterer terrified his wife by repeatedly parking across the street from where she worked so she could see him from her desk. Her supervisor became angry as her work began to deteriorate. However, the police reported that there was nothing they could do because this behavior was not specifically prohibited in the protection order. Thus, unless the victim's work address is unknown to the abuser and the victim feels safer keeping it confidential, it should be specified."

N.I.J. C.P.O. Study at 42.

b. With children or other household members.

When the court believes that a child may be at risk for abduction, physical or emotional harm, or may be used by one parent to gain access to or advantage over the other, the court may wish to exercise its broad authority under §40-13-5(A)(7) to prohibit contact between the respondent and the children.

The court may wish to consider predicating contact with the children on attendance or completion of domestic violence counseling.

The order of protection may award temporary custody and provide for visitation giving primary consideration to the safety of the victim and children.

The names and birth dates of the children from whom the respondent is prohibited from having contact should be listed on the order.

When the protective order includes a prohibition against contact with the petitioner's children or limits contact to specified times, the court may also want to provide the petitioner with extra certified copies of the court order for delivery to each child's school (including the principal and each child's teacher), day care center, babysitter and/or church.

c. By others, such as in-laws, acting on behalf of the respondent to contact the abused party.

The court may use its broad authority under §40-13-5(A)(7) to direct the respondent not to initiate contact through others if that represents a threat to petitioner.

d. The court may choose to specify in the order whether the parties may meet together with their attorneys, and procedures therefor.

4. Orders to vacate.

a. In order of protection.

The Act provides express authority for the court to order an abuser evicted in a final order of protection, by granting sole possession of the residence or household to the petitioner for the duration of the order. §40-13-5(A)(1).

b. *Ex parte* eviction of respondent.

i. Authority to evict

Ex parte judicial eviction of the respondent from the family residence lies within the authority vested in the court pursuant to §40-13-4 together with §40-13-5 A (1). These sections allow the court to issue a temporary no-contact order in the circumstances defined by the statute. The constitutionality of the practice is supported by United States Supreme Court cases on *ex parte* relief.

Most judges regard ex parte eviction of a batterer from the home as the single most effective remedy for most cases of domestic abuse. N.I.J. C.P.O. Study at 42.

ii. Constitutionality

Matthews v. Eldridge, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co*., 416 U.S. 600 (1974); *Boyle v. Boyle*, 12 Pa.D & C 3d 767 (1979); *Marsh v. Williams*, 626 S.W. 2d 223 (Mo. 1982).

c. Court's authority to issue vacate order when the respondent has sole interest in the family residence.

The Act does not specify whether the court may evict a respondent from a home in which s/he has the sole interest. The court's authority in §40-13-5(A)(1) includes either granting the petitioner sole possession of the residence *or* ordering the respondent to provide suitable temporary housing for petitioner and any children respondent is obligated to support. Arguably, the court could find that the current residence is at least temporarily suitable until petitioner can relocate, even if it is solely owned by respondent. No order issued under the Act, however, may affect title to property. §40-13-5(D).

d. Court's authority to issue vacate order after petitioner flees residence to escape abuse.

Nothing in the New Mexico Act suggests that a battered party's right to receive protection under the domestic violence statute, including a vacate order, is affected by the petitioner having left the marital residence to flee abuse before coming to court for protection.

e. Additional relief the court should consider when issuing vacate order.

i. Order that respondent refrain from re-entering premises;

ii. Order respondent to provide financial support to allow petitioner to maintain herself in premises, §40-13-5(A)(1), (2) and (5);

iii. Surrender keys, do not damage petitioner's belongings, etc., §40-13-5(A)(4).

5. Orders concerning personal property.

a. Rights to use of personal property.

The Act gives the court authority to grant sole possession of the household to petitioner, which would presumably include all the property that remains within the household after respondent leaves, §40-13-5(A)(1). Additionally, §40-13-5(A)(4) permits the parties to use any joint property "in the usual course of business or for the necessities of life," provided that they provide an accounting for all expenditures after the order is served. See Standardized Domestic Violence Form 4-967, Custody, Support and Division of Property Order Attachment, item #3, "Property, Debts, Payment of Money," 2/27/01.

b. Restraining the respondent from taking, converting, selling, damaging or destroying any property in which the petitioner has any legal interest.

§40-13-5(A)(4) restrains the parties from transferring, concealing, encumbering or otherwise disposing of petitioner's property or the joint property of the parties except in the usual course of business or for the necessities of life, and to account to the court for all such transferences, encumbrances and expenditures made after the order is served or communicated to the party restrained in court. See Standardized Domestic Violence Form 4-967, Custody, Support and Division of Property Order Attachment, item #3, "Property, Debts, Payment of Money," 2/27/01.

c. Retrieval of property by respondent upon issuance of vacate order. [See also discussion of police assistance *below*].

- When the court issues a vacate order, it is advisable to specify in the order a time and date for the respondent to retrieve personal property and any other items specifically listed in the order.

- Police stand-by procedures are very useful to prevent violence while property is being exchanged. See Standardized Domestic

Violence Form 4-965, Simplified Order of Protection, item #13, "Notice to Law Enforcement Agencies," 2/27/01.

d. Petitioner's removal of property when petitioner is in hiding.

When petitioner has moved to a secret address or is otherwise living out of the household, the court may specify how the petitioner may obtain property from the home, including:

- Specific property to be removed;
- Procedures for police accompaniment;
- Time property may be retrieved. (i.e., consider ordering that property may be removed during respondent's work hours).
- Order that respondent is not to be present when petitioner retrieves property

6. Authority to make orders concerning weapons; federal firearm statute.

When issuing orders of protection, a court may use its broad authority under §40-13-5(A)(7) to restrict the respondent's use or access to firearms, if the court deems it necessary to do so "for the protection of the petitioner." Whether or not the court makes any explicit ruling on this, however, federal law will frequently result in total restriction on respondent's possession of firearms. The court should advise the respondent in the order of the implications of the order on respondent's possession of firearms under federal law.

Under 18 U.S.C. §922(g)(8), persons who are subject to orders restraining them from abusing an "intimate partner" may not purchase or possess firearms or ammunition. If the order restrains the respondent from conduct typically included in orders of protection, is issued after notice and hearing, and includes findings or an express prohibition against the use of physical force, the order may trigger the anti-firearms provisions of the Omnibus Consolidated Appropriations Act of 1997. Note that this section does not apply to stipulated orders of protection because they are issued without an evidentiary hearing and without a finding that domestic abuse has occurred. The statute provides:

"It shall be unlawful for any person . . .

(8) who is subject to a court order that —

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

> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

The penalty for violating this statute is a fine and/or a maximum ten year prison term. 18 U.S.C. §924(a)(2).

18 U.S.C. §921(a)(32) defines "intimate partner" as follows:

> The term 'intimate partner' means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is the parent of a child of the person, and an individual who cohabitates or has cohabitated with the person.

Note that the definition of "intimate partner" in the federal law is not as broad as that of "household member" in §40-13-2(D) of the New Mexico Family Violence Protection Act.

Under the New Mexico Family Violence Protection Act, a court has broad discretion with respect to firearms §40-13-5(A)(7) A court may or may not impose firearm restrictions as necessary to protect the petitioner, or it may tailor firearms restrictions to specific circumstances. For example, a court might prohibit an individual from possessing a pistol in his or her residence, but still permit the individual to possess a hunting rifle at another separate location. It is not clear whether a New Mexico order that allows access to firearms under its own terms would nonetheless result in a prohibition against the purchase or possession of all firearms under 18 U.S.C. §922(g)(8). On its face, the federal statute forbids the purchase or possession of firearms or ammunition in interstate or foreign commerce by persons "who are subject to a court order," without any deference to the court order's provisions in this regard. See *New Jersey v S.A.*, 675 A2d 678 (N.J. Super. Ct. App. 1996), holding that 18 U.S.C. §922(g)(8) prohibited return of confiscated firearms to

person subject to state domestic violence restraining order. Among the issues to consider in resolving this question are: 1) whether the court order was issued after a hearing, and whether the restrained party had notice and an opportunity to participate as provided in 18 U.S.C. §922(g)(8)(A); 2) whether the purchase or possession of firearms or ammunition is "in interstate or foreign commerce"; and, if so, 3) whether the federal statute is preemptive of state law that would permit possession of a firearm under certain circumstances. Federal preemption questions are governed by 18 U.S.C. §927.

Relief from disabilities imposed under 18 U.S.C. 922(g)(8) is available upon application to the Secretary of the Treasury or his or her delegate. The Secretary may grant relief "if it is established...that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c).

In addition to the forgoing restrictions, federal law forbids the sale of firearms or ammunition to a person who is subject to an order of protection or conditional release order that restrains an individual from abusing his or her intimate partner. See 18 U.S.C. §922(d)(8).

Since the federal prohibition on purchasing firearms is likely to take effect automatically after issuance of many orders of protection, the court should advise each respondent of the provisions of the Act so that the respondent does not inadvertently violate them—or cause someone else to violate them by selling weapons to respondent. See Standardized Domestic Violence Form 4-965, Simplified Order of Protection, item #2B, "Consequences of Entry of Order of Protection," 2/27/01.

7. Authority to order treatment for domestic violence perpetrators.

a. New Mexico law specifically authorizes courts to order domestic violence perpetrators into treatment as part of the court's protective order.

Effective July 1, 2001, the Family Violence Protection Act explicitly authorizes the court to include in its order of protection a requirement that "the respondent participate in, at the respondent's expense, professional counseling programs deemed appropriate by the court, including counseling programs for perpetrators of domestic abuse, alcohol abuse or abuse of controlled substances."

b. Perpetrators with substance abuse problems should be ordered to attend separate alcohol and/or other drug treatment and testing prior to batterer's treatment.

"In cases in which the offender is a substance abuser, many judges and victims favor outpatient or voluntary inpatient chemical dependency treatment programs. However, because these programs do not address the issues of violence or control, they should not be viewed as an effective substitute for batterer counseling . . . addiction counseling may be needed first . . . with batterer counseling to follow."

N.I.J. C.P.O. Study at p. 44.

c. The court should exercise extreme care when deciding whether to require the abused party to participate in court-mandated treatment programs intended for perpetrators, family counseling or individual counseling.

"Requiring the victim to enter counseling may put her in increased jeopardy by suggesting to the batterer that he is not responsible for his violence and thereby giving him an excuse to continue his abuse. Couples' counseling improperly conducted may have the same effect; furthermore, it may create a setting in which the victim is at an inherent disadvantage given her fear of the batterer."

N.I.J. C.P.O. Study at 44.

The court should order counseling for the abused party only when that is clearly in the victim's best interest, not as a substitute for issuing relief.

8. Orders concerning custody.

a. Addressing the issue of temporary custody in a civil protective order proceeding can prevent further violence by reducing the perpetrator's access to the abused party. If the perpetrator has continued access to the abused party through the children, abuse of the petitioner may continue. (See NCJFCJ at 26.)

"If victims of family violence have children in common with their batterers, courts often must adjudicate the matter of custody and visitation when issuing protection orders and dissolutions. Courts have sometimes failed to evaluate and provide for children who have lived in abusive homes, and such failure can have tragic consequences for those children."

NCJFCJ at 9.

b. The Family Violence Protection Act authorizes the court to grant temporary custody of the children to either party in an emergency, temporary, or final order of protection or an *ex parte* emergency order of protection.

- §40-13-3.2(C)(3) authorizes the court to "grant temporary custody of any minor child in common with the petitioner and the respondent to the petitioner, if necessary."

- If the court issues an order of protection, the statute authorizes the judge to

  > award temporary custody of any children involved when appropriate and provide for visitation rights, child support and temporary support for the petitioner on a basis that gives primary consideration to the safety of the victim and the children.

  §§40-13-5(A)(2) and 40-13-3.2(A).

- When prior orders relating to child custody have been issued by any court, the statute still allows the judge in the family violence proceeding to issue an initial order of protection, including child custody, visitation and support arrangements "on a basis that gives primary consideration to the safety of the victim and the children." §40-13-5(A)(2). The statute recognizes, however, that such an order might not be consistent with any orders issued in pending or concluded domestic relations cases between the parties. Thus, "the portion of the order dealing with child custody or child support will then be transferred to the court that has or continues to have jurisdiction over pending or prior custody or support action."

c. "Civil protective orders should remove the offender from the home and allow the victim and children to remain with appropriate protection, safety plans, and support . . . . Judges should ensure that necessary services are provided, and that adequate safety plans are in place for both the victimized spouse and the children."

NCJFCJ at 24.

d. The Gender Bias Task Force study of protective order cases heard by District of Columbia Superior Court Judges for a one year period revealed a high correlation between ineffective custody and visitation provisions and contempt of protective orders.

"Simply put, it is not enough to separate the parties; nor is it enough to order the batterer to stop beating the victim. The latter doesn't work without effective enforcement. The former – keeping the parties separated – doesn't work without resolving other family issues such as custody, visitation, possession of the parties' mutual residence and financial support, issues which can serve as a catalyst for continuing abuse." District of Columbia Courts, Final Report of the Task Force on Racial and Ethnic Bias and the Task Force on Gender Bias in the Courts, at 141, 150, Appendix H at 21, May, 1992.

e. Addressing custody as part of a protective order can reduce the incidence of parental kidnapping.

Although not specifically provided in the Family Violence Protection Act, the standardized form includes language permitting the court to order either petitioner, respondent or both not to "hide the child(ren) from the other parent or permanently remove the child(ren) from the State of New Mexico." See Standardized Domestic Violence Form 4-967, Custody, Support and Division of Property Order Attachment, item #1, "Custody," paragraph E, 2/27/01.

f. New Mexico's statute directs judges to make custody determinations in protective order cases giving primary consideration to the safety of the abused party and the children.

§ 40-13-5(A)(2) authorizes an award of custody, visitation and child support "on a basis that gives primary consideration to the safety of the victim and the children." Other factors should be considered in an appropriate domestic relations case between the parties.

9. Visitation

a. Nowhere is the potential for renewed violence greater than during visitation. N.I.J. C.P.O. Study at 43-44.

b. ***Abusive parties seek visitation for two reasons. Like other parents they love or miss their children, particularly during this time when they have been separated from the family. Abusive parties also seek contact with the children to maintain contact, intimidate and control the abused party.*** Judge Ben Gaddis, "Domestic Abuse Protective Order Concepts" (Hilo, HI: 1992) at p. 8**.**

c. To reduce the potential for renewed violence, the court can do the following:

- Craft civil protection orders to eliminate the need for any contact between the parties during visitation. See Standardized Domestic Violence Form 4-967, Custody, Support and Division of Property Order Attachment, item #1, "Custody," paragraph B, 2/27/01.

- Make specific and detailed orders regarding visitation, *id*. Ordering "reasonable rights of visitation" or ordering that visitation "will be arranged later" may place the petitioner in constant contact with the batterer and subject the petitioner to the batterer's control and harassment. N.I.J. C.P.O. Study at 43.

- Order that visitation be supervised. "The propensity for continued violence remains after the divorce or separation and frequently recurs during unsupervised visitation." NCJFCJ at 26.

- Order the perpetrator to complete a domestic violence treatment program prior to any visitation. §40-13-5(A)(6).

- Order the perpetrator to undergo a psychiatric evaluation before visitation is authorized.

- Where the perpetrator has a history of alcohol or other drug abuse, order that a treatment program for both alcohol and/or drugs and violence be completed prior to any visitation. §40-13-5(A)(6).

- Where treatment is ordered and completed, order that the perpetrator not consume alcohol or other drugs before or during the visit, and that the abused party may refuse visitation if the perpetrator appears to have violated this condition. N.I.J. C.P.O. Study at p. 43.

10. Monetary relief, including child and spousal support.

a. The Family Violence Protection Act authorizes the court to order monetary relief as part of protective orders, particularly when the perpetrator is removed from the family home. This relief can be the result of the separation, and thus a legal obligation to support the children or spouse, or it can arise out of the abuse, not the separation, and thus be restorative in nature.

"Civil restraining orders should address . . . [f]inancial support and maintenance for the victim and family members . . . . Economic dependence is frequently the reason the victim returns to the offender. Such ex parte relief is strongly supported by both cases and statutes."

NCJFCJ at 22.

b. Checklist of possible monetary relief available in a protective order:

- Financial support and maintenance for petitioner and children
- Rent, mortgage or alternate housing costs
- Utilities
- Repair bills for damage due to violence
- Replacement of locks
- Petitioner's lost earnings due to abuse
- Child care costs
- Medical, dental and/or, counseling bills for abused party and/or the child(ren)
- Insurance premiums
- Litigation costs, if allowed
- Enforcement of child support obligations through wage withholding

See §40-13-5(A)(5).

11. Ordering police assistance.

The Family Violence Protection Act includes a number of mandatory duties on law enforcement officers.

a. Take necessary steps to protect the victim from further domestic abuse.

§40-13-7 imposes a number of obligations on police officers called upon for assistance by a victim of domestic violence. Specific duties imposed upon the responding officers include: advising the victim of remedies under the Act and availability of shelters and other support services; providing transportation to a shelter if requested; accompanying the victim to the residence to retrieve necessities; placing the petitioner in possession of the premises if requested; arresting the abuser and filing a report; and advising the victim of filing procedures under the Act.

b. Serve notices of hearing and orders.

If an order of protection is entered by the court, then the clerk sends it to the local law enforcement agency for personal service on the respondent (unless the respondent or attorney was in court when the order was issued) at no cost to the petitioner. §40-13-6(A).

c. Read the order to the respondent as part of service.

The court may direct that portions of the order be read to the respondent during service.

"Many officers charged with serving read the key terms of a protection order to the defendant as part of service. For example, when the order evicts the defendant from the home, the police officer… tells the respondent that he is to have absolutely no contact with his partner and is to stay away from the joint residence – even if he believes he has been invited back by the victim; a violation, the officer warns, could result in an arrest. The officer also informs the defendant of his right to a hearing and notes the hearing date. By reading the order aloud, an officer can compensate for any literacy barriers a respondent may have and can preclude future claims by a batterer that he did not understand the protection order."

N.I.J. C.P.O. Study at 60-61.

d. Arrest for violations when probable cause exists to believe a violation of a protective order has occurred.

- The Family Violence Protection Act directs law enforcement officers to "arrest without a warrant and take into custody a person whom the peace officer has probably cause to believe has violated an order [of protection]." §40-13-6(C).

- This includes criminal contempt arrests:

  > "(M)any – perhaps most – police officers are unaware that they may arrest any offender they witness violating a protection order even if the charge is only criminal contempt, and that they may arrest him based on probable cause without having seen the violation if state statute permits warrantless arrest for a violation." N.I.J. C.P.O. Study at 52.

e. Assist with vacate orders.

The court may call upon law enforcement to assist in carrying out the order. See Standardized Domestic Violence Form 4-965, Simplified Order of Protection, item #13, "NOTICE TO LAW ENFORCEMENT AGENCIES," 2/27/01.

f. Assist with retrieval of property by accompanying the party retrieving belongings and standing by while the items listed in the order are retrieved.

The order needs to be specific, since police officers will generally not resolve disputes over items not listed in the order. See Standardized Domestic Violence Form 4-965, Simplified Order of Protection, item #13, "NOTICE TO LAW ENFORCEMENT AGENCIES," 2/27/01.

2.5.3 Content of Order

Orders of protection should be specifically worded:

> "The relief provided should be explained fully and the terminology of the protective order should be highly specific so that the parties, law enforcement and other judges will know exactly what is intended. Otherwise, enforcement will be difficult."

N.I.J. C.P.O. Study at 33.

When issuing its order, the court can facilitate enforcement by insuring that the following are included:

- Physical description of the restrained party, including date of birth, if known.
- Expiration date of the order.
- An order directing all law enforcement agencies to enforce the order by all lawful means, including arresting a respondent who violates any provision of the order.

2.6 Ex Parte and Temporary Orders of Protection

2.6.1 Authority in the Family Violence Protection Act

The Family Violence Protection Act is designed to provide protection against domestic violence through the courts virtually as soon as the violence is first reported. *Ex parte emergency orders of protection* are issued by the court upon a proper request by a law enforcement officer. Temporary orders of protection may be granted *ex parte* or after notice and hearing, upon filing of a petition for order of protection.

2.6.2 *Ex Parte* Emergency Orders Of Protection: Requirements

Purpose. *Ex parte* emergency orders of protection are short-term, emergency measures, issued in the field. Their purpose is to provide protection to victims and their children until they can come to court and seek a temporary order under §40-13-4.

Requests. *Ex parte* emergency orders of protection can only be issued at the request of a law enforcement officer. §40-13-3.2(A).

The request may be submitted to the court by the officer in person, by telephone or via facsimile, and must be accompanied by a sworn written statement setting forth the need for an emergency order of protection and stating the location and telephone number of respondent, if known.

The court may issue the emergency order of protection if it finds reasonable grounds to believe that the petitioner or the petitioner's child is in immediate danger of domestic abuse, following an incident of domestic abuse by a household member. Examples of factors the court may consider to determine whether the standard of "immediate danger" has been met may include:

- History of violence
- Petitioner's injuries
- Respondent's access to weapons
- Threats to attack petitioner
- Threats to attack or abduct the children
- Threats or attacks on other household members
- Drug or alcohol abuse
- History of mental disorder
- Threats of suicide.

A district judge must be available to hear such petitions at all times, as determined within each district, §40-13-3.2(D).

Issuance. Although the order must be written, the statute authorizes the court to issue the emergency order to the law enforcement officer in writing, by telephone or by facsimile.

If the officer receives the order orally, s/he must write and sign the order, with the judge's approval, on the approved form. §40-13-3.2 (B)(1); Standardized Domestic Violence Form 4-973, Emergency Order of Protection, 2/27/01.

The officer is then required immediately to serve a signed copy of the order on the respondent if possible, complete the affidavit of service, provide petitioner with a copy of the order, and provide the court with the original order by the close of the next judicial day. §40-13-3.2(B)(2)(4).

Relief Available. The court is empowered to issue the following relief if the requirements for an *ex parte* emergency order of protection are met:

- Enjoin the respondent from threatening or committing acts of domestic abuse against petitioner or any designated household member; §40-13-3.2(C)(1);

- Enjoin the respondent from any contact with petitioner, including harassing, telephoning, or communicating in any way §40-13-3.2(C)(2);

- Grant petitioner temporary custody of any minor child in common with petitioner and respondent §40-13-3.2(C)(3).

Expiration. Emergency orders of protection expire 72 hours after issuance or at the end of the next judicial day, whichever is later. §40-13-3.2(E). The court is required to note the expiration date clearly on the order, *id.*

By comparison, temporary orders of protection that are issued *ex parte* last through the hearing on the order, which must occur within ten days of issuance. §40-13-4(C).

2.6.3 Review of Emergency Protection Orders

By statute, "a person may appeal the issuance of an emergency order of protection to the court that issued the order. An appeal may be heard as soon as the judicial day following the issuance of the order." §40-13-3.2(F).

2.6.4 When an Ex Parte Emergency Order Is Not Granted

If the court does not grant an *ex parte* temporary order of protection, then the court must serve notice to appear upon the parties and hold a hearing on the petition for order of protection within 72 hours after the petition was filed. If notice cannot be served within 72 hours, then the court issues a temporary order of protection, which is extended for ten days. §40-13-4(D).

2.6.5 Temporary Orders of Protection

Like emergency protection orders, temporary orders of protection are issued ex parte.

Requirements. Upon filing of the petition by the petitioner, the court must immediately determine whether the petition or affidavit state specific facts sufficient to show probable cause to reasonably believe that an act of domestic abuse has occurred. §40-13-4.

- If the judge finds probable cause, the judge must immediately issue an *ex parte* temporary order of protection without requiring the petitioner to post bond. §40-13-4(A).

- The court must then cause the temporary order of protection and notice of hearing to be served immediately on the alleged perpetrator. §40-13-4(B).

- The court must then hold a hearing on the question of continuing the order within ten days of its issuance. §40-13-4(C).

- The district court may issue a Temporary Restraining Order based upon the same incident that justified issuance of the Emergency Order of Protection. §40-13-3.2(G).

Relief Available. A temporary order of protection is issued without requiring the petitioner to post bond. It can order any of the relief available through an order of protection, but subject to the time limits set forth in §40-13-4. See Standardized Domestic Violence Form 4-963, Temporary order prohibiting domestic abuse, 2/27/01.

2.6.6 Recording Abused Party's Injuries

Where possible, the judge should record information regarding the petitioner's visible injuries in written findings on the temporary order.

Recording this information becomes important for use in the subsequent hearing on the permanent civil protective order since by that time the evidence of these injuries may have healed. N.I.J. C.P.O. Study at 28.

2.7 Pretrial Issues

2.7.1 Filing and Service Fees

Both §§40-13-3.1(D) and 40-13-6(A) provide that an alleged victim of domestic abuse shall not be required to pay the cost of issuance or service of a protection order. Thus it would appear that even a non-indigent petitioner is entitled to waiver of court costs associated with issuance or service of a protection order.

2.7.2 Service Of Process And Service Of Protection Orders

Service of process of all protection orders is performed by law enforcement officers. Temporary orders of protection are filed with the clerk, who is required to send them to the local law enforcement authority for personal service on the respondent. §40-13-6(A).

2.7.3 Discovery

Whenever possible, requests for production of documents, or subpoenas for documents, are preferable to face to face depositions.

The ongoing risk of continued abuse or intimidation in domestic violence cases may render depositions unwise. Documents that may be typically subpoenaed or requested include: medical records, documentation of income of the parties for purposes of determining support and other forms of monetary relief and any other documentary evidence that will not improperly restrict case preparation or expose the abused party to greater danger.

Information that may endanger the abused party or the children if obtained by the respondent, including the victim's address, telephone number, the name of the children's school or day care provider, domestic violence shelter's address, etc. may need to be protected by the court.

2.7.4 Case Scheduling

The Family Violence Protection Act provides expedited handling of domestic violence cases for protection orders. The Act requires all courts to have a district judge available to hear petitions for emergency orders of protection, §40-13-3.2(D). Given the Act's authorization of telephone or fax petitions by law enforcement officers and verbal approval by the judge for the officer to complete standardized emergency forms, it is clear that the legislature intended to provide expedited handling of these cases.

Temporary orders must be set for hearing within ten working days of issuance, which date may be extended upon a showing of good cause. Hearings on petitions for orders of protection where ex parte temporary orders have not been issued must occur within 72 hours. §40-13-4(C) and (D).

Where a continuance is necessary during trial, the court should be certain that all warranted temporary orders remain in effect or are reinstated.

2.7.5 Practices to Improve Court Effectiveness in Protection Order Proceedings

1. The National Council of Juvenile and Family Court Judges makes several recommendations for courts, including:

Providing "secure, separate waiting areas for victims in family violence cases." (NCJFCJ at 40.)

Examining "their facilities, procedures, personnel attitudes and training agendas to identify and remove barriers to victims" who seek relief from the court. (NCJFCJ at 41.)

Providing special training to "[a]ll court personnel with responsibility for initial contact [with victims] and intake in family violence cases" in the following areas: sensitivity to victims; [e]nsuring the safety of the victims, [and] . . . [r]eferring the victim and family members to needed services." (NCJFCJ at 44.)

2. Role of lay advocates in orderly preparation and presentation of domestic violence cases.

Lay advocates can assist the court with civil protective order proceedings by:

- explaining the legal help available, potential relief, and the limitations of the protective order;
- helping prepare the petitioner for the hearing on the full order;
- pre-screening petitioners to make sure they meet the eligibility criteria under the statute;
- ensuring that petition forms are properly completed before the hearing;
- accompanying distraught or intimidated petitioners to the hearing;
- arranging to have witnesses appear with the petitioner;
- addressing the petitioners' fears about appearing for the permanent hearing;
- notifying petitioners of their duty to attend hearings; and helping to identify cases in which attorney assistance is essential. **(N.I.J. C.P.O. Study at 24-26.)**

3. The court may wish to encourage local organizations to create and maintain a children's waiting area where childcare is provided while the petitioner/respondent is involved in the court process.

4. Enforcement of the order can be facilitated by instructing petitioner to do the following:

- Keep personal possession of the order at all times.
- Notify the local police immediately of any violation.
- Request that a police report be made. Obtain the report number, and information on how to receive a copy.
- Obtain the name and badge number of the officer who responds to the call.
- File a contempt motion with the court.
- Request that prosecutor charge the perpetrator with all crimes involved in the violation.

2.7.6 Representation Issues

Unrepresented Parties.

Unrepresented parties in domestic violence cases may present special concerns for courts. Wherever possible, special efforts should be made to ensure that petitioners understand the process, the role of the court, and the court's authority in the matter.

1. Use of standard simplified forms.

The Act requires that unrepresented litigants have access to standard simplified petition forms with instructions for completion, and that law enforcement agencies make such forms available to victims of domestic violence. § §40-13-3(H) and 40-13-7(B)(6). The Supreme Court has adopted these forms. Standardized Domestic Violence Form 4-961, Petition for Order of Protection from Domestic Abuse, 2/27/01. This standardization and simplification will assist courts in obtaining the information they require from unrepresented petitioners to determine the merits of each claim for relief.

2. Assistance by court personnel.

Some judges find it useful to instruct court clerks to assist petitioners in applying for civil protection orders, and to provide training for court clerks in the handling of these cases.

a. Court clerks should be given written instructions . . . to provide appropriate assistance in filling out the petition. (N.I.J. C.P.O. Study at p. 27.)

Although court clerks are barred from giving legal advice, that does not preclude their assisting unrepresented litigants by explaining to them the kind of information called for in the various lines of the form. See Supreme Court policy on giving legal advice.

b. The court may want to instruct the clerk to check for past or pending cases involving the same family, and to indicate in the court jacket if such cases exist.

Although the petitioner is required to state whether any other domestic action is pending between the petitioner and the respondent, the petitioner may not understand the question or be able to explain the past or pending litigation adequately.

c. The court should have clerks develop lists of advocacy groups and legal services organizations in the area so that they may refer petitioners to them for assistance.

Non-English Speaking Parties And Recent Immigrants

1. Non-English speaking parties and those who have recently arrived in this country present special concerns regarding representation, as they may not understand court procedures due to language or cultural barriers. This may result in their inability to articulate their needs, the relief they seek, and/or relevant facts.

2. The court may need to adopt special procedures to ensure that non-English speaking parties and recent immigrants fully understand their rights and court proceedings. Such procedures could include:

- Preparation of court forms in the major languages spoken in the local community.
- Providing court translators.
- Employment of bilingual, bicultural court clerks who can explain court proceedings.

2.8 Trial Issues

2.8.1 No Right to Jury Trial

There is no right to jury trial at a hearing for issuance of a protection order.

2.8.2 Failure to Appear

1. When the petitioner does not appear at the hearing on the order.

a. The National Institute of Justice concluded that there are a variety of reasons why a petitioner may not appear for the protective order.

- The abused party is intimidated by threats of greater violence from the respondent as a result of pursuing court action. (N.I.J. C.P.O. Study at p. 29).
- The abused party is physically unable to appear for the hearing due to injuries.
- The abused party has been told by police or other local officials that if they want to drop the matter, they should not appear in court.

- The abused party does not understand that a second hearing is required.

b. Prior continuances or procedural delays may also discourage the abused party from appearing at the hearing. The more expeditiously a case is handled, the more likely the petitioner is to pursue remedies.

Ford, D.A. and Burke, M.J., Victim-Initiated Criminal Complaints for Wife Battery: An Assessment of Motives, Paper presented at the Third National Conference for Family Violence Research, University of New Hampshire, Durham, N.H., July 1987.

c. The court may want to consider asking the respondent who appears in the petitioner's absence to wait, and then direct an advocate or court officer to telephone the petitioner and ascertain the reason behind the petitioner's failure to appear. (N.I.J. C.P.O. Study at p. 28.)

d. Where the petitioner has failed to appear, the court may dismiss the proceeding with prejudice, but with the understanding that the petitioner may refile for relief should a new incident or further need arise.

2. When the respondent has been served with notice of the hearing and fails to appear, the court should issue a protective order if evidence supports the required evidentiary findings.

2.8.3 Notice and Review of Other Court Proceedings and Orders

1. The court must be familiar with other final and pending proceedings involving the parties.

It is critical that family, criminal, civil, and juvenile court judges avail themselves of information regarding pending legal processes and current court orders involving the same parties so as to avoid issuing conflicting orders as discussed in Section D below. The Act contemplates this by requiring the petitioner to state whether any other domestic actions are pending, §40-13-3(C), and by the requirements of §40-13-5(C). That provision requires the court to state on the order of protection if it supersedes or alters any prior orders of the court. In particular, if the court's order of protection affects child custody or support issues previously or currently in litigation, then that portion of the order may be entered, but must be transferred to the court involved in the other litigation, whether concluded or pending.

2. Protection orders can be provided as a remedy whether in addition or as an alternative to pre-existing criminal or divorce-related remedies, thus expanding the total range of judicial powers available. (N.I.J. C.P.O. Study at 1.)

2.8.4 Record and Findings

Although neither the statute nor the standard simplified forms for court orders explicitly require the court to issue detailed written findings, the court should consider doing so in circumstances where the court's findings could prove useful in subsequent proceedings.

The detail of the oral or written findings needed will vary depending on the context in which the civil protective order is issued.

a. Default orders.

The court may want to make findings orally on the record that the protective order is being issued on the basis of the law enforcement officer's or abused party's sworn affidavit. If the court has also taken testimony the court may want to note that the order is issuing based on the court's determination of the abused party's credibility.

b. Emergency and temporary orders when the court has witnessed physical injuries.

The court may want to make findings regarding these observations and note them on either the temporary protective order itself or on the abused party's petition in the court file. (N.I.J. C.P.O. Study at 28.)

c. Contested trials/contempt.

The court can make explicit findings as to which incidents of violence the court is relying upon to issue its protective order. It is also advisable to comment on the credibility of each witness' testimony. Written findings will be helpful to courts hearing the case in the future as well as judges who may hear other cases involving the same parties. Thus written findings are advisable whether or not the court will retain the case for enforcement. Transcripts are rarely a workable solution because of the costs and time delay associated with obtaining them.

d. Denial of orders and/or remedies requested.

The National Council of Juvenile and Family Court Judges urges written specification of reasons for denying a protective order. (NCJFCJ at 5.) The

court may want to make written findings of fact commenting on the evidence presented and the credibility of each witness.

2.8.5 Consent Orders and Mediation

1. Inappropriateness of mediation in protective order proceedings.

a. Judges should not mandate mediation in cases where family violence has occurred. (NCJFCJ at 28.)

Because assault of any kind is a serious crime and needs to be treated as such by the courts, mediation of family violence is simply not an appropriate response. Mediation is a process by which the parties voluntarily reach consensual agreement about the issue at hand. Violence, however, is not a subject for compromise. Thus, when the issue before the court is a request for an order of protection or a criminal family violence charge, mediation should not be mandated. The victim receives no protection from the court with a mediated "agreement not to batter." And a process which involves both parties mediating the issue of violence implies, and allows the batterer to believe that the victim is somehow at fault. (NCJFCJ at 28.)

2. Distinction between mediated orders and consent or stipulated Orders:

a. "Consent civil protection orders" or stipulations are not a result of mediation; they are generally presented to judges after negotiation between counsel in which the parties have been able to come to an agreement as to the provisions that must be included in the order of protection.

b. *(O)nce an emergency protection order has been issued, attorney-assisted negotiation between the victim and the offender can be helpful to work out the complex details of such matters as visitation, necessary exchange of personal goods, and other provisions to be included in the permanent order*. (N.I.J. C.P.O. Study at p. 32)

c. Courts should carefully review stipulated orders in domestic violence cases, particularly where one litigant is unrepresented, to ensure the safety of the child(ren) and the abused party.

d. When presented with a Stipulated Order of Protection, the court should verify that the parties understand the consequences of agreeing to such an order. While most of the protections of the Family Violence Protection Act apply to stipulated orders, stipulated orders will not be entered into the state or national registry for orders of protection as would orders with findings of abuse.

e. The court may wish to help develop alternative non-mediation-based methods of entering consent orders.

2.8.6 Mutual Civil Protection Orders

Judges should not generally issue mutual protective or restraining orders. (NCJFCJ at 25.)

1. Mutual protective orders are generally not appropriate unless both parties file pleadings, receive prior notice, and prove violence or abuse.

Where issuance of mutual orders of protection is supported by evidence that both parties are entitled to such relief against the other, based on a petition and counter-petition and on findings that domestic abuse has occurred, the court should use the appropriate Standard form, 4-965.

2. Mutual protection orders can create these problems:

- Due process problems when mutual protective order is issued without prior notice, proper pleadings, and a finding of good cause.
- Obstacles to enforcement that render them ineffective in preventing further abuse. Police have no way of determining whose conduct has prompted the order and been enjoined. This may result in both parties being arrested, or in no arrests being made.
- Sending a signal to the batterer that such behavior is excusable, was perhaps provoked, and that the batterer will not be held accountable for the violence.
- Failure to identify who is the primary aggressor.

One way to determine the identity of the primary aggressor is to make an assessment as to which party is afraid of being seriously hurt. Usually only one party is afraid of the other. The primary aggressor usually is not concerned about being hurt but uses violence by the other party as a justification or explanation for his

own actions. (Judge Ben Gaddis, "Domestic Abuse Protective Order Concepts [Hilo, HI: 1992] at p. 5-6.)

2.8.7 Modifications of Civil Protection Orders

1. The Family Violence Protection Act allows either party to file a motion to modify an order of protection.

a. Protective orders may be modified to include any remedy that could have been included in the initial order.

§40-13-5(E) permits either party to apply for a review hearing to amend the order. The section further provides that "[a]n order of protection involving child custody or support may be modified without proof of a substantial or material change of circumstances."

b. Judges hearing modification of protective order requests should be well acquainted with the history of the relationship between the parties before entering a modification.

c. Orders should not be modified without notice and a hearing absent exigent circumstances.

2. Modification upon reunification of parties.

a. The National Institute of Justice survey found that:

(J)udges should inform petitioners that they must come back to court to modify the protective order if they decide to try living with the respondent again. By having the victim return to court, the judge can reassess the situation and make sure the victim is aware of all the risks of allowing the offender back into the home and is freely choosing to permit him to return. The judge can also make clear that the no-abuse provision can remain in force even though the eviction is vacated. (N.I.J. C.P.O. Study at p. 53.)

b. Courts should encourage victims to return to court for modification of their orders when they reunite with the perpetrator, removing stay away provisions but leaving the no abuse provision in full effect.

Leaving the no abuse provision in effect will assure that police can continue enforcing the no-abuse provisions of the civil protective order.

2.8.8 Extensions of Orders/Reissuance in Writing

1. Orders involving custody or support.

The duration of an order of protection involving custody or support is set in the order for a period not to exceed six months. §40-13-6(B). But the court may extend the order up to six months longer for good cause upon motion by the petitioner. *Id.*

2. Injunctive orders.

Orders providing injunctive relief (e.g., no contact or stay away orders) continue until modified or rescinded upon the motion of either party, or until the court approves a subsequent consent agreement of the parties. §40-13-6(B). In practice, however, courts generally put an expiration date on the order, as required to obtain full faith and credit for the order pursuant to the federal Violence Against Women Act, 18 U.S.C. §2265.

3. Factors the court may consider in determining whether good cause exists to extend an order involving custody or support.

a. Petitioner continues to fear respondent.

b. There is outstanding pending litigation between the parties, whether a criminal case, divorce, custody or child support matter.

c. An order of protection may be extended even when there has not been additional violence.

4. Courts should not exclude evidence of violations not reported prior to application for an extension. Abused persons may not report violations immediately for several reasons, including:

a. The abused party may be reluctant to come to court due to intimidation by the respondent.

b. The abused party received some level of protection from the order despite the violations and therefore wishes the order to continue.

c. The perpetrator succeeded in preventing the abused party from filing for contempt.

d. The abused party does not believe that the court will act to enforce the protective order.

2.8.9 Dismissals and Withdrawals of Orders

1. Due to the possibility of coercion or intimidation, dismissals should be carefully considered.

2. If the court is not convinced that the petitioner is requesting dismissal voluntarily, the court may want to continue the matter for a period of time. Advantages of a continuance rather than immediate dismissal of the case include:

- Deterrent effect on some offenders.
- Petitioner need not wait for a new incident of violence in order to return to court to obtain a protective order.
- If a new incident of violence occurs, the abused party needs only to file a supplemental petition to be served along with the original petition to have a new hearing set.

CHAPTER 3

CIVIL ORDERS OF PROTECTION: ENFORCEMENT

This chapter covers:

- Judicial procedures to help ensure compliance with orders of protection.
- Remedies to punish violations of orders of protection.
- Full faith and credit for protection orders under the federal Violence Against Women Act.
- Trial issues for violations of orders of protection.
- Sentencing and appropriate case dispositions.

3.1 Overview

The effectiveness of protective orders depends largely on how well they are enforced by both the judiciary and law enforcement.

> "Comprehensive provisions of restraining orders are only as good as their enforcement. To improve enforcement, courts should develop, publicize, and monitor a clear, formal policy regarding violations. This might include follow up hearings, promoting the arrest of violators, incremental sanctions for violations, treating violations as criminal contempt, and establishment of procedures for modification of orders. In addition, courts can establish procedures for monitoring offenders for compliance."

National Council of Juvenile and Family Court Judges (NCJFCJ), *Family Violence: Improving Court Practice*, 1990, p. 21-22.

> "Enforcement is the Achilles' heel of the civil protection order process, because an order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security. Offenders may routinely violate orders, if they believe there is no real risk of being arrested.
>
> [I]t appears that when protection orders only offer weak protection, the explanation may lie in the functioning of the justice system rather that the nature of protective

> orders as a remedy . . . . (C)hanges in the justice system's handling of protection orders can significantly increase their utility. . . . [W]here judges have established a formal policy that offenders who violate an order will be apprehended and punished, often with a jail term, both judges and victim advocates report the highest level of satisfaction with the system."

National Institute of Justice (N.I.J.), *Civil Protective Orders: Legislation, Current Court Practice and Enforcement*, March 1990, at p. 2 (Cited as N.I.J. C.P.O. Study).

> "Courts can develop, publicize and monitor a clear, formal policy regarding violations in order to encourage respect for the court's order and to increase compliance. . . . [C]ourts can develop guidelines specifying (1) what procedures law enforcement officers are statutorily required and authorized to follow and (2) what procedures judges themselves will follow in holding violation hearings. By developing and publicizing these guidelines in advance, judges would be able to achieve more uniformity of judicial response, would encourage compliance and respect for the judiciary among defendants (and their attorneys), and might avoid unnecessary and protracted appeals. . . . Although some provisions of a court enforcement policy must be tailored to the specific enforcement tools provided by the statute, other policies are adaptable to virtually any jurisdiction."

N.I.J. C.P.O. Study at p. 49.

> "Aggressive enforcement and prompt case handling by the court itself is also crucial. While police officers can assist the court by arresting and detaining offenders who violate protection orders, the court will ultimately be responsible for long-range enforcement."

N.I.J. C.P.O. Study at p. 52.

This chapter outlines considerations for the court when enforcing court orders. It is meant to assist the court in improving the effectiveness of court orders in domestic violence cases.

3.2 Judicial Procedures to Help Ensure Compliance with Orders of Protection

3.2.1 Procedures for Sending Protection Orders to the Local Law Enforcement Agency

The Family Violence Protection Act requires that the court file each order of protection with the clerk of the court and that the clerk send a copy of the order to the local law enforcement agency. §40-13-6(A). The latter requirement is intended not only to have the law enforcement agency effect service (at no charge) on the respondent, but also to ensure the local authorities are aware of the existence of the court's order if they are called to a disturbance involving the parties. With the order of protection in hand, police responding to

a call from or on behalf of the victim can more readily take the actions authorized in the order.

3.2.2 Filing Orders of Protection in the FACTS™ System

Although efforts have been made to develop a central statewide registry for domestic violence orders of protection, those efforts have not been successful to date. Courts should file orders of protection in the FACTS™ system. At such time as a central registry becomes operational, courts should be certain to register all orders of protection. This practice will alert courts and law enforcement officers in other jurisdictions of the outstanding order and allow them to respond more effectively.

3.2.3 Judicial Tools to Enforce Compliance with Orders of Protection

Courts have a variety of tools to enforce compliance, especially in cases where there is reason to believe that violations of the order of protection are likely. Among the options the court has are to:

- Retain the case to monitor compliance.
- Arrange for formal supervision of all criminal contempt cases through probation services where available and court volunteers.
- Swiftly issue *sua sponte* orders to show cause on any contempt violations brought to the court's attention by police, probation, service providers, counselors, or the petitioner.
- Treat failure by the respondent to participate in court-ordered treatment or counseling as a significant violation of the order.
- Conduct hearings promptly on contempt motions.
- Sentence persons found in criminal contempt to increasingly severe penalties with each subsequent contempt.

Adapted from NCJFCJ, *Family Violence: Improving Court Practice*, 1990, at 20-21.

3.3 Remedies to Punish Violations of Orders of Protection

3.3.1 Arrest

The Family Violence Protection Act mandates police officers to "arrest without warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order" pursuant to the Act. §40-13-6(C). Moreover, §40-13-6(G) requires the officer charging the person with the violation of the order to also "file all other possible criminal charges arising from an incident of domestic abuse when probable cause exists." Clearly, the statute has given law enforcement officers considerable responsibility and authority to enforce judicial orders of protection. A judge may question any failure by law enforcement to uphold this responsibility when brought to the attention of the court.

See, however, the *caveat* about warrantless arrests written by the Rules of Civil Procedure Committee, which drafted the uniform domestic violence forms for Supreme Court approval:

> "Absent the exigent circumstance that the misdemeanor is committed in the presence of the officer ("If an officer observes the person arrested committing a felony, exigency will be presumed," *Campos v. State*, 117 N.M. 155, 159 (1994)), the New Mexico Constitution appears to bar blanket authority to make warrantless arrests for misdemeanors committed outside the presence of the officer. . . . To avoid having the Supreme Court give approval to a form containing language of questionable constitutional validity, the committee did not use the statutory language in the portion of the Final Order describing the power of a law enforcement officer to make a warrantless arrest for the misdemeanor crime (Section 40-13-6(D) NMSA 1978), of violating the Final Order of Protection."

Civil Form 4-965, Committee Comment.

3.3.2 Misdemeanor Charge

Violation of an order of protection issued under the Family Violence Protection Act is a misdemeanor, punishable as provided under §31-19-1. This means that even though only a district court may issue an order of protection, magistrate and metropolitan court judges have authority to hear violations of those orders as misdemeanors, §40-13-6 E. A second conviction is punishable by a mandatory jail term of not less than seventy-two consecutive hours—which may not be suspended, deferred or taken under advisement. *Id.*

Note that any violation of the terms of an order of protection can support a criminal conviction. In *State v. Nysus*, 2001-NMCA-023, 130 N.M. 431, the defendant argued that his telephone call to his former wife's place of employment was *de minimis* and insufficient to support his conviction for violating a protection order. The court affirmed the sufficiency of the evidence for the conviction, pointing out that the order prohibited any contact and did not make an exception for *de minimis* contact. The defendant's telephone call violated the order.

Unlike the defendant in *Nysus*, who actually spoke with his former wife on the telephone, the defendant in *State v. McGee* was convicted of violating a protection order by making four telephone calls to the victim's home, even though the victim did not answer the telephone and the defendant did not actually speak to her. As in *Nysus*, the protection order here prohibited the defendant from "contacting" the victim. The Court of Appeals affirmed the defendant's convictions of violating a protection order and explained that "'contact' is not limited to a direct communication." *State v. McGee*, 2004-NMCA-14 (2003), ¶10, 135 N.M. 73.

3.3.3 Contempt of Court

The court is required to include in the order a notice that violation of the protection order constitutes contempt of court and may result in a fine or imprisonment or both. §40-13-5(B). The uniform domestic violence forms have adopted language fulfilling this requirement.

See, uniform domestic violence Form 4-965, Order of Protection, Paragraph 2, 2/27/01; and Form 4-963, standard temporary order prohibiting domestic abuse, p. 3, Enforcement of Order, 2/27/01.

Criminal or Civil Contempt?

Whether the contempt is civil or criminal depends on the purpose that the court seeks to achieve through its punishment. "Where a contempt sanction is punitive, not remedial, 'the proceeding is one of criminal contempt.'" *Beverly v. Beverly*, 2000-NMCA-097, ¶8, 129 N.M. 719, 13 P.3d 77 (citation omitted). "[C]riminal contempt is punishment that vindicates the authority of the court." *State v Pothier*, 104 N.M. 363, 365 (1986). In civil contempt, on the other hand, "the punishment is remedial to coerce the defendant to perform the act ordered by the court." *Id.* at 364. "Imprisonment for civil contempt is ordered where a defendant has refused to do an affirmative act required by the provisions of an order. . . . The decree in such cases is that a defendant stand committed unless and until he performs the affirmative act required by the court's order." *Id.* Civil contempt can also be imposed to compensate the complainant for losses sustained. *State ex rel Apodaca v. Our Chapel of Memories of New Mexico, Inc.*, 74 N.M. 201 (1964). The courts have recognized that contempt is often both civil and criminal in nature in the same case. "Indeed, the same conduct or acts may justify a court in resorting to coercive and to punitive measures." *Id.* at 204 (citations omitted).

The significance of determining whether a contempt is civil or criminal lies in the protections afforded the defendant. If a contempt charge is determined to be criminal in nature, the defendant is afforded rights of personal service, opportunity to be present, conviction only by proof beyond a reasonable doubt, and other rights not necessarily afforded to civil defendants. Reunification of the parties after issuance of the civil protective order is not a defense to contempt.

Criminal Contempt

Examples of Criminal Contempt. Examples of criminal contempt in domestic abuse cases include criminal acts against the petitioner or another protected party under the order of protection. These acts may take the form of assaults, battery, threats, stalking, harassment, rape, forcible detention, or property crimes, among others. In such cases, the primary purpose of the sentence is clearly to punish for past wrongdoing. The court also applies criminal contempt when it imposes sanctions for acts that are not criminal apart from their defiance of the order of protection. Such acts may include violations of no-contact or stay-away provisions or temporary support or custody obligations.

Standards Governing Proceedings in Criminal Contempt. Since criminal contempt is a criminal charge, the defendant is entitled to many of the constitutional rights of an accused. For example, an order to show cause can only issue on the basis of an affidavit or sworn testimony provided to the court to support that order. *State v. Helms*, 108 N.M. 772 (1989). Defendants are entitled to personal service of process on themselves--not on their attorneys. *Lindsey v. J.A. Martinez*, 90 N.M. 737 (CA. 1977). The defendant must be present for the

arraignment, at the time of the plea, and at every other stage of the trial unless waived." *Id.* at 741; *Beverly v. Beverly*, 2000-NMCA-097, ¶10, 129 N.M. 719. The defendant will also have a right to counsel. Perhaps most important, punishment for criminal contempt can subject a defendant to double jeopardy if he is later prosecuted for the offense that gave rise to the contempt citation. Criminal contempt charges do not, however, generally invoke a right of trial by jury. *State v. Powers*, 1998-NMCA-133, ¶25, 126 N.M. 114.

Criminal contempt creating Double Jeopardy. When a court holds a respondent in contempt for violating an Order of Protection, the possibility exists that the contempt sanction may preclude a subsequent criminal prosecution for the same act on the grounds that it constitutes double jeopardy. NM Constitution, Article II, §15; U.S. Constitution, Amendment V.

In *State v. Gonzales*, 1997-NMCA-039, 123 N.M. 337, the Court of Appeals held that where the defendant had been convicted on a misdemeanor contempt charge for violating a domestic violence order of protection and sentenced to jail time, double jeopardy did not bar prosecution of the defendant for the offenses of stalking and harassment stemming from the same conduct that gave rise to the contempt. In a later case, *State v. Powers*, 1998-NMCA-133, the court held that where a provision in an order of protection prohibiting "battery in any manner" contained all the elements of the statutorily-defined offense of battery, a criminal prosecution for battery following a contempt proceeding for violating the protection order violated the defendant's right against double jeopardy. The test applied by the court in each case was whether the criminal charge included any element not contained in the previous contempt offense. *State v. Powers*, 1998-NMCA-133, ¶17; *State v. Gonzales*, 1997-NMCA-039, ¶¶14-15.

A subsequent prosecution after incarceration for criminal contempt arising from violation of an order of protection is therefore not barred so long as the elements of criminal prosecution differ from those of the contempt conviction. *State v. Powers*, 1998-NMCA at ¶¶17-18. This decision also urges that trial courts "exercise extreme care in identifying which of the provisions of the restraining order form the basis for the contempt charge, and what elements are required to show that these provisions were violated . . . ." *Id.* at ¶33. For example, "in some cases, a violation of the 'no contact' or 'stay away' provision in a restraining order may be sufficient to support a contempt charge without precluding a subsequent prosecution [e.g. for battery] on double jeopardy grounds." *Id.* Moreover, a judge may defer sentencing on a contempt citation while a criminal case is pending, and then reconsider imposing sentence after the outcome of the criminal case is known.

Civil Contempt

Examples of Civil Contempt. Civil contempt will usually be imposed when the defendant had an affirmative obligation to perform some act and failed or refused to do so. Common examples include paying support, delivering a child for a court-ordered visit, or vacating or turning over property. In these cases, the purpose of the contempt sentence is generally to enforce compliance: the respondent "can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *State v. Helms*, 108 N.M. 772, 774

(1989). Nevertheless, if respondent is jailed, the contempt proceeding is civil only if the contemnor can get out of jail at any time by complying with the court's order. *Id.* Conversely, it is possible for the contemnor to be incarcerated without bond in civil contempt, because the constitutional requirement of release on bond only applies to criminal incarceration.

3.4 Full Faith and Credit for Protection Orders Under the Federal Violence Against Women Act

Every state in the United States and many tribal jurisdictions have enacted statutes authorizing courts to issue civil protection orders against domestic violence. The federal Violence Against Women Act ("VAWA") requires New Mexico courts to give full faith and credit to qualified protection orders issued in other states and in tribal jurisdictions (including the District of Columbia, and any commonwealth, territory, or possession of the United States). In general, a protection order issued in accordance with the law of the issuing state or tribe is entitled to full faith and credit under the VAWA. Enforcement measures upon violation are governed by the law of the enforcing jurisdiction. This section details the criteria that a protection order must meet to be entitled to full faith and credit under the VAWA, and describes how New Mexico courts are to enforce qualifying orders issued in other jurisdictions.

Note: The Violence Against Women Act also makes it a federal criminal offense to cross a state line or enter or leave Indian country with the intent to violate a protection order. 18 U.S.C. §2262.

3.4.1 When Is a Protection Order Entitled to Full Faith and Credit?

Under 18 U.S.C. §2265, a sister state or tribal protection order must be given full faith and credit if: 1) the issuing court had jurisdiction under the laws of its state or tribe; and, 2) the person subject to the order had notice and a reasonable opportunity to be heard. The statute provides:

> "(a) Any protection order issued that is consistent with [18 U.S.C. §2265(b)] by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.
>
> "(b) A protection order issued by a State or tribal court is consistent with this subsection if —
>
> (1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and
>
> (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case

> of *ex parte* orders, notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights."

New Mexico courts must enforce tribal protection orders and orders from courts of other states as provided in 18 U.S.C. §2265 and under state law, §40-13-6 D.

The examples in the following discussion illustrate the application of the jurisdictional and due process criteria of 18 U.S.C. §2265.

The Issuing Court "Has Jurisdiction Over the Parties and Matter" Under the Law of Its State or Tribe

A sister state or tribal protection order will be entitled to full faith and credit under the VAWA only if the issuing court had personal and subject matter jurisdiction under the laws of its own jurisdiction. In New Mexico, the question of **personal jurisdiction** has been of particular concern where one of the parties to a protection order is a member of an Indian tribe. An exhaustive treatment of the laws governing jurisdiction over tribal members and tribal lands is beyond the scope of this Benchbook. Due to the complexity of the law in this area, the authors recommend that New Mexico judges consult with local tribal judges to resolve questions regarding the jurisdiction of each court. For a general discussion of the relationships between state, tribal, and federal laws, see Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 Judicature 118 (1995), and Feldman and Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 Judicature 154 (1995).

Several examples of problems that are likely to arise include:

Tribal court orders of protection

- Under federal law, a tribe has civil and criminal jurisdiction over Indians from its own tribe and Indians from other tribes. Hence, a tribal order of protection issued against an Indian of the same or another tribe meets the jurisdictional requirements of federal law. However, the Violence Against Women Act requires that the tribe have personal jurisdiction over the respondent according to its own tribal law in order for a tribal protection order to receive full faith and credit. See 18 U.S.C. §2265(b)(1). Consequently, a respondent may argue that the tribal order of protection should not be given full faith and credit by the state court because the tribe did not have personal jurisdiction under its own law. The difficult question then becomes how the state court should evaluate whether the tribe had personal jurisdiction under the tribe's own laws.

- A tribal court order of protection issued against a non-Indian should receive full faith and credit in so far as it imposes civil penalties (as long as the tribe had personal jurisdiction over the non-Indian and provided the non-Indian adequate notice and an opportunity to be heard). However, as a matter of federal law, tribal courts do not have subject matter jurisdiction to impose criminal sanctions against

non-Indians. Therefore, any criminal sanctions included in a tribal court order of protection against a non-Indian should not be enforced by the state.

Orders from other state courts.

- An order of protection issued under New Mexico law against a person with whom the petitioner has had a continuing personal relationship is enforceable in the courts of another state, even though the enforcing state does not itself authorize orders of protection to unrelated persons.

- Similarly, a court that is asked to enforce an order from another state protecting a child in the household must look to the law of the issuing state, not the enforcing state, to see if such coverage is authorized.

The Restrained Party Has Been Given "Reasonable Notice and Opportunity to Be Heard"

The second criterion for full faith and credit under the VAWA is that the party subject to the protection order be given "reasonable notice and opportunity to be heard . . . sufficient to protect that person's right to due process." 18 U.S.C. §2265(b)(2). The statute further provides that where the protection order is issued *ex parte*, "notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued . . . ."

The VAWA's notice requirement has particular significance for New Mexico *ex parte* emergency orders of protection or temporary orders of protection, which are enforceable within New Mexico immediately upon a judge's signature without regard to service or notice to the respondent. See §§40-13-3.2 A and 40-13-4. Despite their immediate efficacy in this state, New Mexico's *ex parte* emergency orders of protection will not be entitled to full faith and credit in other jurisdictions until the respondent has received notice and an opportunity to be heard under New Mexico law.

3.4.2 What Types of Orders Are Entitled to Full Faith and Credit?

The "protection orders" governed by the VAWA full faith and credit provision are defined as follows:

> "'[P]rotection order' includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil and criminal courts (other than support or child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection." 18 U.S.C. §2266.

The definition set forth in 18 U.S.C. §2266 encompasses the following types of orders:

- Protection orders issued by tribal courts against member and nonmember Indians.
- Protection orders issued by tribal courts against non-Indians so long as they carry only civil sanctions for violation.
- Orders protecting persons other than the petitioner, if the law of the issuing jurisdiction permits the court to include such persons in its protection orders.
- Conditional release orders issued in a criminal proceeding for the protection of a named individual.
- Orders of protection issued by New Mexico courts.

Each of these types of orders will be eligible for full faith and credit if the issuing court had personal jurisdiction over the respondent and the respondent had notice and an opportunity to be heard.

Although 18 U.S.C. §2266 specifically excludes orders for support or child custody from the VAWA's full faith and credit provisions, other federal and state laws give full faith and credit to child support and child custody provisions contained in an order of protection. See discussion below. Some mutual protection orders are also ineligible for full faith and credit under the VAWA. The following discussion explains.

Orders for Child Custody or Support

The VAWA's definition of "protection order" specifically excludes "support or child custody orders." This exclusion is a potential source of confusion, since protection order statutes in jurisdictions outside New Mexico may specifically permit courts to make provision for emergency support and custody within their civil protection orders, as New Mexico does. §40-13-5(A)(2).

It is not yet settled whether the VAWA's exclusion of "support or child custody orders" extends to provisions for *emergency* support and custody contained within civil protection orders. Some legal scholars conclude that Congress did not intend to address enforcement of such provisions in the VAWA, while others believe that such provisions are entitled to full faith and credit when issued for safety purposes. *See* Goelman, et al, *Interstate Family Practice Guide: A Primer for Judges*, §§306-307 (ABA Center on Children & the Law, 1997). In any event, there are other federal full faith and credit provisions applicable to support and child custody orders that apply regardless of whether the order in question was issued in the context of a domestic relations or a protection order proceeding.

- The Parental Kidnapping Prevention Act, 28 U.S.C. §1738A, requires states to accord full faith and credit to sister state custody orders that meet certain jurisdictional and notice criteria. Under 28 U.S.C. §1738A(b)(3), the description of custody orders

entitled to full faith and credit is broad enough to include custody provisions contained within civil protection orders. The statute defines "custody determination" as "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications."

Note: The Uniform Child Custody Jurisdiction and Enforcement Act, §§40-10A-101 et seq., generally requires New Mexico courts to recognize and enforce other states' custody orders, §40-10A-313. The Act defines a "custody proceeding" broadly enough to include civil protection order actions: "'child custody proceeding' means a proceeding in which legal custody, physical custody or visitation with respect to a child is an issue. The term includes a proceeding for . . . protection from domestic violence in which the issue may appear." §40-10A-102(4).

- 28 U.S.C. §1738B requires states to accord full faith and credit to sister state and tribal support orders made consistently with its provisions. This statute's definition of "child support order" is broad enough to include support provisions contained within a protection order. 28 U.S.C. §1738B(b) states that "child support order" means:

  > "(A) . . . a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and
  >
  > (B) includes — (i) a permanent or temporary order; and (ii) an initial order or a modification of an order."

  Note: The Uniform Interstate Family Support Act ("UIFSA"), §40-6A-101, also requires New Mexico courts to recognize valid child support orders issued by other states and Indian tribes. A "support order" under the UIFSA could include a support provision contained within another state's protection order. The Act defines "support order" as "a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, or reimbursement, and may include related costs and fees, interest, income withholding, attorney fees, and other relief." §40-6A-101 (21).

Mutual Orders

Limitations on the VAWA's full faith and credit requirement arise where a court issues a mutual protection order against both parties, and the respondent was the petitioner's spouse or intimate partner. 18 U.S.C. §2265(c) provides:

> "(c) A protection order issued by a State or tribal court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if--

> (1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or
>
> (2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order."

The portion of a mutual order restraining the respondent is entitled to full faith and credit regardless of whether the restraint on the petitioner meets the foregoing criteria. "Spouse or intimate partner" is defined in 18 U.S.C. §2266 to include:

> "(A) a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and
>
> "(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides."
>
> *Note:* New Mexico law requires the court, upon a finding that domestic abuse has occurred, to "enter an order of protection ordering the *respondent* to refrain from abusing the petitioner or any other household member." §40-13-5(A). Presumably that means that a counter-petition would have to be filed and supported by evidentiary findings to restrain petitioner as counter-respondent through a mutual order of protection.

3.4.3 How Does the Enforcing Court Give Full Faith and Credit to Another State or Tribal Order?

If a protection order from another state or a tribe meets the jurisdictional and notice requirements of the VAWA's full faith and credit provision, this order must be enforced "as if it were the order of the enforcing State or tribe." 18 U.S.C. §2265(a). This means that a New Mexico court enforcing a foreign jurisdiction's protection order should impose on the respondent the same sanctions for violation that are available for violations of orders of protection under New Mexico law. These sanctions may differ from those that would have been imposed in the issuing jurisdiction.

A foreign state order of protection that would be enforceable only as criminal contempt in its state of issuance may be enforceable in New Mexico as a misdemeanor, §40-13-6(E).

3.4.4 Facilitating Enforcement of New Mexico Orders of Protection in Other Jurisdictions

In light of the federal requirements for full faith and credit described above, New Mexico courts can facilitate enforcement of New Mexico Orders of Protection in other jurisdictions by taking the following steps:

- Help the parties to better understand the scope of the order by informing them orally and in writing that the order is enforceable in all U.S. states and territories, and on tribal lands.

- Use only the standard forms approved by the Supreme Court.

- Complete the forms using language that is explicit, unambiguous, comprehensive, and legible.

Clearly cite the statutory authority under which the order is issued. This citation — coupled with a recitation of the relevant jurisdictional facts — will assist the enforcing court in its assessment of the order under the VAWA jurisdictional criteria.

3.4.5 Members of the Armed Forces and Civilian Employees of the Department of Defense

See Department of Defense Directive, no. 5525.9, 12-27-88, Implementing National Defense Authorization Act, P.L. 100-456 and 10 U.S.C. §814 (Department of Defense shall cooperate with courts and state and local officials in enforcing court orders).

3.5 Trial Issues

The restrained party may not defend against a contempt citation by relying on any action or failure to act by the petitioner such as provocation or withholding of visitation rights by the petitioner. The respondent can seek relief through the court for any alleged violation without violating stay-away or no contact orders, for example

The U.S. Attorney General's Task Force recommended that the court admonish the offender that any contact with the protected party, even if initiated by the protected party, may constitute a violation of the no-contact order. Attorney General's Task Force on Family Violence, *Final Report*, U.S. Department of Justice, Washington, D.C.: 1984, at 43.

3.6 Sentencing Contemnors for Violations of Protection Orders

> "For civil protection orders to deter batterers from further abusing their partner, respondents must believe that the judge will impose a meaningful penalty for any violation.
>
> A jail sentence may also help motivate police officers to adopt and to maintain a policy of arresting batterers who violate protection orders. Many police officers . . . said one of their reasons for not arresting violators is that prosecutors and judges do not seem to take these cases seriously by following up arrests with swift and meaningful sanctions . . . ."

N.I.J. C.P.O. Study at 58.

3.6.1 Standards for Determining the Length of a Sentence

> "In imposing punishment for contempt, the following matters are to be considered by the trial court: the seriousness of the consequences of the contumacious behavior, the public interest in enforcing a termination of defendant's defiance, and the importance of deterring future defiance. . . . The punishment imposed should be reasonably related to the nature and gravity of the contumacious conduct."

Case v. State, 103 N.M. 501, 502 (1985).

3.6.2 Checklist of Aggravating or Mitigating Circumstances

- The offender's criminal history; any current probation terms, etc.
- Nature of victim's injuries
- Use of dangerous or deadly weapon
- Threats made by offender to harm self, victim, or others
- History of abusive behavior
- Previous violations of court orders
- Presence of children and others living in the home who may be affected by the abuse
- Drug, alcohol and mental health evaluations where appropriate
- Vulnerability of victims (e.g., elderly, handicapped, youthful, etc.)
- Victim impact statement

3.6.3 Sentencing When There is a History of Prior Contempt Findings

Options for the court in sentencing a contemnor with a history of violations include:

- **Enhanced penalties, including period of custody.**

  §40-13-6(E) provides for a misdemeanor sentence for any first violation of an order of protection. But the Act then provides an escalating sentence for second and subsequent offenders:

  "Upon a second or subsequent conviction, an offender shall be sentenced to a jail term of not less than seventy-two consecutive hours that shall not be suspended, deferred or taken under advisement." *Id.*

- **Full restitution.**

  The Act mandates the court to award full restitution to the petitioner for the violation of the order of protection. §40-13-6(F). Note, however, that violation of an order of protection is no longer a prerequisite for the issuance of restitution. *Id.*

- **Treatment for batterer.**

The court is required to order the person convicted of a violation of an order of protection "to participate in and complete a program of professional counseling, at his own expense, if possible. §40-13-6(F).

CHAPTER 4

CHILD CUSTODY AND VISITATION

This chapter covers:

- The procedural context in which child custody and domestic violence issues arise together.
- Custody issues in civil domestic violence cases.
- Domestic violence issues in child custody cases.
- Visitation provisions.
- Expert witnesses, child witnesses, and confidentiality.
- Court procedure when issuing custody or visitation orders.
- Grandparent visitation.

4.1 Procedural Context

Domestic violence and child custody issues can combine before the New Mexico courts in four types of cases:

- Criminal cases charging domestic violence crimes.
- Child abuse and neglect cases.
- Civil domestic violence proceedings.
- Domestic relations proceedings.

In handling these kinds of cases, the court should recognize that domestic violence can affect children both directly and indirectly:

- Direct victimization: Children can be directly subject to acts of domestic violence. The definition of domestic abuse in New Mexico includes "harm or threatened harm to children" as set forth in the Family Violence Protection Act. §40-13-1. The actions subject to the provisions of the Act, through the definition of domestic abuse in §40-13-2(C), are:

- Physical harm.
- Severe emotional distress.
- Bodily injury or assault.
- A threat causing imminent fear of bodily injury by any household member.
- Criminal trespass.
- Criminal damage to property.
- Repeatedly driving by a residence or work place.
- Telephone harassment.
- Stalking.
- Harassment.
- Harm or threatened harm to children "as set forth in the paragraphs of this subsection."

- Indirect victimization: Children can be victimized by other forms of domestic violence in a number of ways, such as:

    - Modeling of inappropriate and destructive behavior in relationships.
    - Creation of an atmosphere of violence, fear, and tension.
    - Behavioral changes in the victim parent in response to domestic abuse.
    - Use of children as a means by which an abuser parent maintains contact with or leverage over the victim parent.
    - Disruption of the child's academic, social or physical activities and development.
    - Threatening to harm or abandon pets, sometimes after newly acquiring them.

4.1.1 Criminal Cases

Criminal cases involving domestic violence and child custody can arise before district, metropolitan and magistrate courts, and municipal courts where municipalities enact appropriate ordinances. The court can respond as follows:

- In setting pre-trial conditions of release: The court should consider the effect of past violence and the risk of future violence, and establish conditions of release that protect the alleged victim and the children.

- In establishing conditions of probation: The court should require compliance with any existing court order for the protection of the victim or the children. The court should determine whether additional special conditions of probation are necessary to provide the victim or the children with even broader protection.

4.1.2 Child Abuse and Neglect Cases

Where domestic violence creates an abusive situation and children are taken into state custody, the court can require that the abuser obtain treatment as a condition of visitation

with the children. See *Lucero v. Pino*, 1997-NMCA-089, 124 N.M. 28. See generally *New Mexico Child Welfare Handbook: A Legal Manual on Child Abuse and Neglect*, Institute of Public Law (2003).

4.1.3 Civil Domestic Violence Proceedings

Civil domestic violence proceedings arise before district or metropolitan courts or domestic violence commissioners. The case may be postured as follows:

- Without accompanying divorce or child custody proceedings: The court should exercise its jurisdiction to protect the alleged victim and the children, keeping in mind that any custody orders must be designed to effect the best interests of the children.

- Where there are pending separate divorce or child custody proceedings: The court should take emergency action as necessary to protect the alleged victim and the children, and transfer the child custody issues to the court handling the domestic relations case.

- In domestic relations cases where child custody is at issue: These cases are heard in the district courts. The court should make custody determinations to effect the best interests of the children, and recognize and plan for the effects of domestic violence, past and future, upon the children.

4.2 Custody Issues in Civil Domestic Violence Cases

4.2.1 Emergency Action to Protect Alleged Victims and Children

If the judge has probable cause from the allegations of the petition for an order of protection to believe that children have been threatened with or actually harmed, a temporary (10-day) order of protection may be designed to protect the petitioner as well as any other household member, including children. §40-13-4. A variety of provisions are authorized, but the temporary relief granted must be specifically stated. §40-13-5(A).

- Housing: The court may separate the parties, requiring the alleged abuser to move out of the family home or to provide suitable alternative housing for the petitioner and the children pending a hearing. This applies to children to whom the alleged abuser owed a legal duty of support. §40-13-5(A)(1).

- Custody: The court may make a temporary award of child custody, as well as temporarily establish visitation rights and support obligations. §40-13-5(A)(2). The domestic violence court's primary consideration is the safety of the victim and the children. §40-13-5(A)(2). Custody of pets may be addressed in the order as well.

4.2.2 Transfer of Issues Where Other Custody Cases Are Pending

Proceedings under the Family Violence Protection Act are independent of other domestic relations cases. §40-13-3(E). The petitioner should inform the court at the outset of the pendency of other domestic cases. §40-13-3(C). If temporary protection requires alteration of an existing order of custody or support, the temporary order should say so. §40-13-5(C). The order should plainly inform the parties of the need to address such issues in the domestic relations forum.

After the initial order, child custody and support issues are transferred to the court handling the pending domestic relations case. §40-13-5(C). It is strongly recommended that the court arrange for the court in which the domestic relations case is pending to hear the 10-day proceeding and consider consolidation of that issue with the DR case. This can avoid situations where the temporary order expires and leaves no order of protection in place. The Family Violence Protection Act does not expressly require any formal order of transfer. Language in the temporary order recognizing the legal requirement of transfer and informing the parties may be sufficient under the Act.

It is a good practice in any case to provide a copy of the temporary order to the domestic relations court so that it may be aware of:

- Any temporary changes in its custody and support award.
- The potential need for future hearings to review custody and support.

4.2.3 Resolution of Issues Where No Other Custody Cases Are Pending

Minor Party. If one of the parties (petitioner or respondent) is a minor, the court should appoint an attorney or guardian *ad litem* for that party. *Lucero v. Pino*, 1997-NMCA-089, 124 N.M. 28.

Duration of Custody or Support Orders. An initial order awarding child custody or support under the Family Violence Protection Act expires six months after the date of entry. §40-13-6(B). Petitioner must show good cause for an extension; an extension for six additional months or less may then be granted. §40-13-6(B).

4.2.4 Modification of Protection Orders Involving Child Custody or Support

As distinguished from custody or support orders in domestic relations cases, under the Family Violence Protection Act the parties may request modification without showing proof of a substantial or material change in circumstances. §40-13-5(E). Although the statute does not clearly say so, this provision is probably restricted to domestic violence cases where there is no pending domestic relations case.

Once custody and support issues are transferred to the domestic relations court, the domestic violence court would appear to have no more jurisdiction over those issues in the absence of new allegations of domestic abuse that require further emergency action under the Family Violence Protection Act. Compare *Lucero v. Pino*, 1997-NMCA-089, 124 N.M. 28.

4.2.5 Enforcement

Child custody and support provisions in an order of protection may be enforced, as with any other provision in the order, by:

- Arrest without warrant if the police have probable cause to believe that a violation has been committed. §40-13-6(C). But see the caveat discussed above at §3.3.1.
- Criminal misdemeanor punishment. §40-13-6(E). The Act requires that restitution and counseling, at the offender's own expense if possible, be ordered. §40-13-6(F).
- Sanctions for contempt of court. §40-13-5(B). This may raise a double jeopardy bar to criminal prosecution. See *State v. Powers*, 1998-NMCA-133, 126 N.M. 114, and *State v. Gonzales*, 1997-NMCA-039, 123 N.M. 337.

4.3 Domestic Violence Issues in Child Custody Cases

4.3.1 Mediation

In domestic relations cases where issues are raised under the Family Violence Protection Act, mediation may not be ordered unless the court is first assured that the parties will be safe and the proceedings will be fair. §40-13-3(D).

4.3.2 "Best Interests of the Child" Standard

In New Mexico, the primary consideration in child custody determinations is the best interests of the child. §40-4-9(A). As listed in §40-4-9(A), relevant factors include:

- Parents' wishes.
- Child's wishes.
- Child's interaction and interrelationship with parents, siblings and any other person who may significantly affect the child's best interest.
- Child's adjustment to home, school and community.
- Mental and physical health of all individuals involved.

If the child is 14 years old or older, the court must consider the child's desires before making a decision, §40-4-9(B), although the court is not required to honor or grant those desires.

4.3.3 Presumption in Favor of Joint Custody

New Mexico law requires courts to begin an initial custody analysis presuming that joint custody is in the best interests of the children. §40-4-9.1(A). Some other states, and many advocacy organizations, believe that a court should not follow a presumption of joint custody where domestic violence is involved. New Mexico courts are bound by law to follow the presumption of joint custody, but domestic violence may be sufficient, alone or in combination with other factors, to overcome the presumption in individual cases.

The court is expressly required to consider any history of domestic abuse in making the custody determination. In addition to the factors in §40-4-9(A) concerning the "best interests" principle, §40-4-9.1(B) sets forth a list of factors that must be considered in determining whether joint custody is in the best interests of the child. One of these specifically addresses the history of domestic violence and the safety of the child:

> "whether a judicial adjudication has been made in a prior or the present proceeding that either parent or other person seeking custody has engaged in one or more acts of domestic abuse against the child, a parent of the child or other household member. If a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child, the abused parent or other household member."

The other factors under §40-4-9.1(B) are:

- Whether the child has established a close relationship with each parent.
- Whether each parent is capable of providing adequate care for the child throughout each period of responsibility, including arranging for the child's care by others as needed.
- Whether each parent is willing to accept all responsibilities of parenting, including a willingness to accept care of the child at specified times and to relinquish care to the other parent at specified times.
- Whether the child can best maintain and strengthen a relationship with both parents through predictable, frequent contact and whether the child's development will profit from such involvement and influence from both parents.
- Whether each parent is able to allow the other to provide care without intrusion; to respect the other's parental rights and responsibilities and his or her right to privacy.
- The suitability of a parenting plan for the implementation of joint custody, preferably, although not necessarily, one arrived at through parental agreement.
- Geographic distance between the parents' residences.
- Willingness or ability of the parent to communicate, cooperate or agree on issues regarding the child's needs.

The court must set forth in the record its analysis of these and any other factors in awarding custody. §40-4-9(I).

4.3.4 How Domestic Violence Affects the Analysis

Best Interests Analysis. The existence of domestic violence may:

- Be a significant feature of the children's interrelationship with parents or parent figures.
- Contribute to a child's adjustment difficulties, if any.
- Affect the court's assessment of the mental health of the individuals involved.

Additional Joint Custody Factors. The presence of actual or threatened domestic violence can affect nearly all of the individual statutory factors noted above, but is especially determinative of:

- The ability of the parents to meet the children's needs. See, e.g., *In re Eventyr J.*, 120 N.M. 463 (Ct. App. 1995) (affirming district court finding, in an abuse and neglect case, that mother had shown her inability to meet children's needs by exposing them to domestic violence).
- Whether the abuser will allow the victim to parent without intrusion.
- The willingness of both parents to communicate, cooperate or agree on child-raising issues. See, e.g., *Creusere v. Creusere*, 98 N.M. 788 (1982) (a high level of incompatibility between the parents may justify sole custody.).

In addition, the abuser's visitation rights and support obligations can become a forum for further abuse.

4.3.5 Modification of an Award of Child Custody in Domestic Relations Cases

From Joint Custody to Sole Custody. Failure of parents under joint custody to work together in the best interest of the children may authorize a court to redetermine legal custody. See *Strosnider v. Strosnider*, 101 N.M. 639 (Ct. App. 1984).

From Sole Custody to Joint Custody. In subsequent determinations, under §40-4-9.1(A) sole custody may not be changed to joint custody unless:

- There is a substantial and material change in circumstances since prior determination affecting the welfare of the child; and
- Joint custody is now in the best interests of child.

Changing Physical Custody without Changing Legal Custody. This change requires a showing of a substantial change since the final order in:

- The circumstances of the custodial home; or

- The capacity of the custodial parent.

See, e.g., *Campbell v. Alpers*, 110 N.M. 21 (Ct. App. 1990)

4.3.6 Considerations When Other Family Members Request Custody

This discussion is limited to private custody disputes and does not apply to child abuse or neglect cases involving the state.

In custody disputes between parents and nonparents, New Mexico follows a modified version of the "parental preference doctrine." This doctrine "holds that in a custody contest between a parent and a nonparent, the parent should generally prevail unless he or she is found unfit." *Thomas-Lott v. Earles*, 2002-NMCA-103, ¶ 14, 132 N.M. 772. This doctrine is consistent with §40-4-9.1(K), which states: "When any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent."

When granting custody of a child to a nonparent, the court must make an express finding that the parent is unfit. The courts have determined that a parent is unfit when the parent is unable to care for the child, because of parental inadequacies or conduct detrimental to the child, such as abuse, neglect, or abandonment. Domestic violence may be a relevant factor in determining a parent's fitness—both for the abusing parent's fitness and the victim parent's fitness. An abused parent's failure to recognize the harm to a child caused by domestic violence, or failure to get help in ending an abusive situation, may be factors in determining whether a parent is neglecting a child. Cf. *State ex rel. Children, Youth & Families Dep't. v. Tammy S.*, 1999-NMCA-009, ¶¶ 17-18, 126 N.M. 664.

The parental preference doctrine has been limited by the courts, so that "[a] parent who is an otherwise fit custodian can be denied custody based on a finding that 'extraordinary circumstances' justify such a decision." *Thomas-Lott* at ¶ 15 (quoting *In re Adoption of J.J.B.*, 119 N.M. 638, 652 (1995)). Extraordinary circumstances exist when there is a "substantial likelihood of serious physical or psychological harm [to the child] . . . or serious detriment to the child." *Id.* at ¶ 25 (internal citations and quotations omitted). The courts have recognized lengthy separations between parent and child as extraordinary circumstances, but have not yet decided whether domestic violence presents an extraordinary circumstance. In cases involving domestic violence and a request for custody by a nonparent, the court may wish to undertake the following analysis to determine whether a parent is unfit or there are extraordinary circumstances justifying custody with a nonparent:

- Determine whether the request is merely an attempt by one parent to continue a pattern of power and control over the other parent, through other family members or other third parties.
- In cases where a professional submits an evaluation of the custody request, determine whether that professional is specifically trained in the area of domestic violence.
- Ensure that the child does not have responsibility for choosing who has custody.

"Custody and Visitation," *Domestic Violence in Civil Court Cases*, Family Violence Prevention Fund (1992) at p. 243.

4.3.7 Enforcement

Custody orders may be enforced by:

- Contempt of court sanctions. This typically requires the victim to request relief by written motion.
- Petition under the Family Violence Protection Act. This can occur when a violation of a custody or support order also equates to domestic abuse. The parties need not live together for domestic abuse to occur. §40-13-2(D) (definition of "household member").

4.4 Visitation Provisions

If the parties have a history of domestic violence, visitation provisions should be designed to reduce or eliminate the risk to the victim and children. Visitation and exchanges may be the abuser's best opportunity to affect the victim and obtain the satisfaction of a response.

4.4.1 Counseling

Some courts have required completion of domestic violence counseling requirements as a condition of award or expansion of visitation rights.

4.4.2 Supervised v. Unsupervised Visits

Past or potential harm or threatened harm to children weighs in favor of greater supervision of visitation with the abuser. Extreme cases may justify an award of little or no visitation.

4.4.3 Restrictions on Place or Time of Exchange

To assure the safety of the children and the domestic violence victim, the court may:

- Prohibit the abuser from coming to the residence of the victim to make the exchange unless the victim's safety can be assured.
- Require the exchanges to take place in a public and well-populated place, at a social service agency or at the local police station, if there is a potential for abuse at the exchanges. It is helpful if the court maintains familiarity with local social service resources, the scope of their services and their fee structures.
- Ensure that the guidelines for exchanges are sufficiently definite so that the abuser cannot manipulate them to exercise control over the victim.

- In appropriate cases, reduce or eliminate the ability of the parties to depart from a pre-set schedule, or delegate the authority to make changes to a strong third party, such as a parenting coordinator or special master.

4.4.4 Communication

The court may consider restricting communication by:

- Prohibiting the parties from communicating through the children.
- Prohibiting the parties from making negative statements about the other party in the presence of the children.

The court should further consider imposing a requirement that all communications between the parties be in writing. This will both minimize communications and make judicial oversight of the appropriateness of any communications far more practical, by avoiding unverifiable charges and countercharges about statements made.

4.5 Expert Testimony

The court has authority to appoint an expert witness under Rule 11-706 of the Rules of Evidence. An expert witness may assist the court in determining:

- Protective measures essential to safeguard the child and abused parent.
- Effective remedies to mitigate against the potential long-term consequences of past violence to assure the post-separation adjustment of the child and the abused parent.
- Reasons that an abused parent may not have acted with the best judgment in parenting in the past.
- Whether the abused parent can adequately parent once protected from the ongoing violence.

"Custody and Visitation," *Domestic Violence in Civil Court Cases,* Family Violence Prevention Fund (1992), p. 216-217.

4.6 Confidentiality

Confidentiality is appropriate in some domestic violence proceedings due either to legal privileges against disclosure or for the protection of the victim.

4.6.1 Psychotherapist-Patient Privilege

Rule 11-504 governs the psychotherapist-patient and physician-patient privilege. According to the rule:

> "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, including drug addiction, among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family."

The abuser as well as the victim may be able to maintain some privacy about the content of any therapy if the requirements of the rule are met.

4.6.2 Husband-Wife Privilege

Rule 11-505 governs the privilege between spouses:

> "A person has a privilege in any proceeding to refuse to disclose and to prevent another from disclosing a confidential communication by the person to that person's spouse while they were husband and wife."

The privilege does not apply in civil actions where the husband and wife are opposing parties. Rule 11-505(D)(3).

4.6.3 Victim's Address and Phone Number

In appropriate cases, the court should be prepared to keep the victim's address and phone number sealed in court records to protect the victim from further violence.

4.7 Child Witnesses

4.7.1 Required Child Testimony

In a child custody case, the court must consider the desires of a child fourteen or older, §40-4-9(B), which may be expressed by the child, a guardian ad litem or a Rule 706 expert child custody evaluator, and must consider the wishes of younger children, §40-4-9(A). If the court chooses to take the child's testimony, this is done in chambers with a court monitor or court reporter, but without parties or their counsel. §40-4-9(C). If the hearing is tape recorded, the parents are not allowed to listen to the tape unless an appeal is taken. §40-4-9(C). To ensure compliance with this provision, the tape should be labeled and stored separately.

4.7.2 Discretionary Child Testimony

In other cases, the court may be called upon to balance the value of a child's testimony against the harm to the child that would result. Rule 11-601 governs the competency of

witnesses, stating that "every person is competent to be a witness except as otherwise provided in these rules."

The court should be aware of the potential for bias in the child's testimony through the power of one or both parents to manipulate the child. The potential harm to a child witness may include:

- Trauma of reliving past violence.
- Trauma of being placed between warring parents.
- Damage to future relationship with parents.

The court may need expert testimony to assess the potential harm to a child of testifying in a particular case.

With child witnesses, there may be a tension between protecting the child and assuring due process for the parties. There is no right under the Sixth Amendment to the U.S. Constitution to confront a child witness in a civil trial.

For a detailed discussion of child witnesses, see Chapter 27 (Evidence) of the *New Mexico Child Welfare Handbook: A Legal Manual on Child Abuse and Neglect*, Institute of Public Law (2003).

4.8 Court Procedure When Issuing Custody and/or Visitation Orders

4.8.1 Use of Specific Language in Orders

Many courts have found that custody and visitation orders in domestic violence cases are most effective when they contain very specific language regarding conditions of the order and specify how future disputes between the parties will be resolved. This prevents either party from taking advantage of any loopholes or ambiguities (e.g. "reasonable visitation") resulting from nonspecific language. In addition, law enforcement officers report that they have difficulty enforcing orders with ambiguous conditions.

Examples of specifically worded conditions:

- Visitation shall take place every first and third Saturday from 10 a.m. to 3 p.m., at the home of and in the presence of Mary Smith, plaintiff's aunt, at 123 Main St., City. The plaintiff is responsible for dropping off the child by 9:45 a.m. and picking up the child at 3:15 p.m. In the event that visitation cannot take place, the party must telephone Mary Smith at (123) 456-7891 by 8:30 a.m., and visitation shall then take place the following Saturday with the same provisions.

- If respondent wishes to exercise visitation rights, he must call Mary Smith at (123) 456-7891 by 10 a.m. the day before. Mary Smith shall then call the plaintiff.

- Respondent shall consume no alcohol or illegal drugs during the 12 hours prior to and during visitation. If Respondent appears to have violated this provision, Mary Smith is authorized to deny visitation that week.

- Visitation is conditioned upon respondent receiving weekly batterer's counseling from X organization, for a certain period of time, e.g., 1 year.

- Visitation may be denied if the respondent is more than 30 minutes late and does not call by 8 a.m. to alert plaintiff to this (to prevent custodial parent and child spending all day waiting for the other parent, who never comes).

- If there is a third party available for pick-up and drop-off, or supervised visitation: Plaintiff must arrive at the drop-off location 20 minutes before respondent and leave before respondent arrives. At the end of visitation, respondent must remain for 20 minutes while plaintiff leaves with the children. (This prevents respondent following plaintiff to harass her or ascertain the location of her new residence.)

- If there is no third party available, even for exchanging the children: Drop off and pick up of the children shall occur in the lobby of the local police department. Respondent shall remain at least 20 min. after plaintiff has left after dropping off the children, and again when plaintiff leaves with the children at the end of visitation. (See above comment.)

4.8.2 *Pro Se* Parties

The court may want to carefully question visitation terms where the abused party is *pro se*, especially where there is a consent agreement. Because of the abuser's control and her fear, the battered spouse may agree to custody provisions that are not really desirable for herself or for the children. The battered spouse also may feel pressured to agree to inadequate financial support or inequitable distribution of assets in exchange for a custody or visitation agreement that is more protective of the children.

4.8.3 Safety Concerns in the Courtroom

Examples of how safety concerns in the courtroom may be addressed include:

- Establishing and maintaining secure courtroom facilities.
- Assuring that courtroom security personnel are present during domestic violence cases.
- Ordering the bailiff to detain the perpetrator for 20 minutes after a domestic violence hearing or trial to give the battered party time to leave without being followed.

4.8.4 Court-Provided Resources and Information

Resource lists of local shelters, perpetrator treatment programs, legal assistance, etc. should be compiled and made readily available to both parties. When the plaintiff is unrepresented, it is helpful if the court clerk makes an extra copy of the custody/visitation order for the plaintiff.

4.9 Visitation by Grandparents

This section addresses the rights of grandparents to visit with grandchildren over the objection of a custodial parent. Grandparents' right to visitation is relevant to a discussion of domestic violence because the parents of an abuser may seek visitation with grandchildren in order to allow the batterer continued access to the children and the battered spouse—even when a court has prohibited contact by the batterer. Consequently, courts must be very careful and deliberate when deciding whether to grant a petition for visitation under the Grandparent's Visitation Privileges Act.

Courts must also be careful when granting grandparent visitation in cases where the custodial parent objects because parental rights are fundamental constitutional rights. Thus, courts must consider a parent's due process rights when applying the Grandparent's Visitation Privileges Act.

For example, in *Troxel v. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court held that the trial court infringed on the mother's fundamental right to make childrearing decisions when it granted the grandparents visitation without giving any special weight to mother's assessment of an appropriate amount of visitation for her children, when it shifted the burden of persuasion to the mother to disprove that visitation would be in the best interest of the children, and when it substituted its judgment for the mother's without any evidence of parental unfitness. Although the Court intimates that a certain deference must be paid to the parent's wishes, the Court does not establish a bright-line rule requiring a finding of parental unfitness before a court may "veto" the parent's wishes and allow grandparent visitation.

Since *Troxel,* the New Mexico Court of Appeals has considered the application of the New Mexico Grandparent's Visitation Privileges Act in three cases. See *Deem v. Lobato,* 2004-NMCA-102, 136 N.M. 266; *Gutierrez v. Connick,* 2004-NMCA-017, 135 N.M. 217; *Williams v. Williams*, 2002-NMCA-074, 132 N.M. 445. In *Williams*, 2002-NMCA-074, the parents relied on *Troxel* to argue that an order allowing grandparental visitation against their wishes was unconstitutional because the court did not make a finding of parental unfitness and did not give any special weight to the parents' wishes. The Court of Appeals held that the visitation order was consistent with *Troxel* and was constitutional, finding that the trial court gave sufficient consideration and weight to the parent's wishes in light of the long and extensive relationship between the child and the grandparents and the court's documented concerns about the custodial parent's ability to be a good parent. The Court further held that *Troxel* does not require a formal finding of parental unfitness in order to grant grandparent visitation over the objection of the parents. Instead, the Court concluded that *Troxel* simply

requires the presence of "special factors regarding parental unfitness," which may include the court's concern over a parent's ability to fulfill his or her parental responsibilities in an appropriate manner short of parental unfitness.

More recently, the Court of Appeals reversed an order granting grandparental visitation because the grandparents failed to meet their burden of demonstrating factors that support visitation and that show visitation would be in the child's best interests. Indeed, the trial court found only that the grandparents were the paternal grandparents of the child, that the parents had a very unstable relationship, that the grandparents had a stable relationship with the child's father, and that, in the court's view, visitation would be in the child's best interests. The trial court made no findings about the parents' fitness, about the child's relationship with the grandparents, or about any of the other factors delineated by §40-9-2(G). Given these limited findings, the appellate court concluded that the grandparents had not presented "sufficient evidence to relax the concern about infringement on a fit parent's fundamental right to make decisions about the care, custody, and control of his or her child," and therefore reversed the order allowing visitation. *Gutierrez v. Connick*, 2004-NMCA-017, ¶ 17.

4.9.1 Applicability

New Mexico's Grandparent's Visitation Privileges Act, §40-9-1, defines "grandparent" in §40-9-1.1 as:

- The biological grandparent or great-grandparent of a child; or
- A person who becomes a grandparent or great-grandparent due to the adoption of a minor child by a member of that person's family.

4.9.2 Availability

In Certain Proceedings. Under §40-9-2(A), the court may order grandparent visitation privileges either as part of or after a judgment in the following proceedings:

- Dissolution of marriage.
- Legal separation.
- Paternity under the Uniform Parentage Act (§40-11-1). (Under §40-11-7(A), putative grandparents have standing as interested parties to sue to establish a parent-child relationship for the purpose of establishing themselves as maternal or paternal grandparents in order to obtain visitation privileges. *Gutierrez v. Connick*, 2004-NMCA-017, ¶ 14, 135 N.M. 217.

By Petition. The circumstances in which a grandparent may petition for visitation of a minor child are:

- If one or both of the child's parents are deceased, any grandparent of the child may petition the district court for visitation privileges. §40-9-2(B).

- If the child once resided with the grandparent and the following conditions are met, the grandparent may petition the court for visitation:

    - The child resided with the grandparent for at least three months and the child was less than six years old at the beginning of that period; §40-9-2(C); **OR**
    - The child resided with the grandparent for at least six months and the child was at least six years old at the beginning of that period, §40-9-2(D); **AND**
    - The child was subsequently removed from the grandparent's home by the child's parent or any other person, §40-9-2(C), (D); **AND**
    - The child's home state is New Mexico under the Child Custody Jurisdiction Act (§40-10-1), §40-9-2(C), (D).

- If the child has been adopted, or adoption is sought, by one of the following people, under §40-9-2(E) the biological grandparent may petition the court for visitation:

    - Stepparent.
    - Relative of the child.
    - A person designated to care for the child in the deceased parent's will.
    - A person who sponsored the grandchild at a baptism or confirmation conducted by a recognized religious organization.

- If the child is adopted by a stepparent and the parental rights of the natural parent are terminated or are relinquished, "the biological grandparents are not precluded from attempting to establish visitation privileges." §40-9-2(F). This does not apply if the parental rights are terminated or relinquished and the child is adopted by a nonstepparent. But see *Lucero v. Hart*, 120 N.M. 794 (Ct. App. 1995) (legislature intended to allow the court to grant grandparent visitation if in best interests of child even though grandparent's son relinquished parental rights).

Limits on Filing. Grandparents may file a petition no more than once a year, unless good cause is shown. §40-9-3(B).

4.9.3 Factors to Consider

The standard for a determination of grandparent visitation is whether visitation is in the best interests of the child, based on an evaluation of the child's physical, intellectual, and moral well-being. *Lucero v. Hart*, 120 N.M. 794 (Ct. App. 1995). The burden of proof is on the grandparent. *Ridenour v. Ridenour*, 120 N.M. 352 (Ct. App. 1995). When considering a grandparent's petition for visitation with a child, the court is required to assess all of the following factors:

- Any factors relevant to the best interests of the child.
- The prior interaction between the grandparent and the child.
- The prior interaction between the grandparent and each parent of the child.

- The present relationship between the grandparent and each parent of the child.
- Time-sharing or visitation arrangements that were in place prior to filing of the petition.
- The effect visitation with the grandparent will have on the child.
- If the grandparent has any prior convictions for physical, emotional or sexual abuse or neglect.
- If the grandparent has previously been a full-time caretaker for the child for a significant period.

The court has discretion to assess the following factors, according to *Lucero v. Hart*, 120 N.M. 794 (Ct. App. 1995):

- Love, affection and other emotional ties that may exist between the grandparent and the child.
- Nature and quality of the grandparent-child relationship and the length of time it has existed.
- Whether visitation will promote or disrupt the child's development.
- Physical, emotional, mental and social needs of the child.
- Wishes and opinions of the parents.
- Willingness and ability of the grandparent to facilitate and encourage a close relationship between the parents and child.

When assessing whether grandparents should have visitation with a child from a family with domestic violence, the court should consider whether the request for visitation is merely an attempt by an abusive parent to continue a pattern of power and control over the other parent or an attempt by the abusive parent to have unsupervised contact with a child when such contact has been otherwise limited or eliminated by the court. Such an assessment is permissible as consideration of "factor[s] relevant to the best interest of the child," of whether visitation will promote or disrupt the child's development, and as an aspect of the physical, emotional, mental and social needs of the child.

4.9.4 Tools for the Court

When a grandparent's visitation privileges are at issue, the court may:

- Order mediation and evaluation in any matter. If the judicial district has established a domestic relations mediation program under the Domestic Relations Mediation Act (§40-12-1), the mediation shall comply with that Act. Upon motion and hearing, the district court must act promptly on the recommendations set forth in a mediation report. §40-9-2(H).
- Appoint a *guardian ad litem* for the child if the parent challenges the petition. *Lucero v. Hart*, 120 N.M. 794 (Ct. App. 1995).

4.9.5 Scope of the Visitation Privilege

Visitation Granted. The court may grant a grandparent reasonable visitation privileges that are not in conflict with the child's education or prior established visitation or time-sharing privileges. §40-9-2(A). The court is required to issue any necessary order to enforce the visitation privileges. §40-9-3(A). If a grandparent sues to enforce the visitation order and the court finds that order was violated, the court may award court costs and reasonable attorney fees to the prevailing party. §40-9-3(C).

Visitation Not Granted. If the court decides that grandparent visitation is not in the best interest of the child, the court may order other reasonable contact between the grandparent and the child, including regular communication by telephone, mail or any other reasonable means. §40-9-2(I).

Full Faith and Credit. New Mexico recognizes an order or act regarding grandparent visitation privileges issued by any state, district, Indian tribe or territory of the United States of America. §40-9-4(B).

Temporary Privileges. The court may order visitation on a temporary basis before issuing a final order under the following circumstances:

- If one or both of the child's parents are deceased and a grandparent petitions for visitation. §40-9-2(B).
- Pending mediation or evaluation. §40-9-2(H).

Modification of Visitation. The court may modify the grandparent's visitation privileges upon a showing of good cause by any interested person. §40-9-3(A).

Change of Child's Domicile. When a grandparent has been granted visitation privileges and the child's custodian intends to leave the state or relocate within the state with the intention of changing that child's domicile, under §40-9-4(A) the custodian must do all of the following:

- Notify the grandparent of the custodian's intent to change the child's domicile at least five days prior to the change.
- Give the child's address and telephone number to the grandparent.
- Afford the grandparent the opportunity to communicate with the child.

CHAPTER 5

DOMESTIC VIOLENCE AND CHILD ABUSE AND NEGLECT

This chapter covers:

- Domestic violence and child abuse or neglect.
- Assuring that the child's interests are represented in court proceedings.
- Community groups that can assist the court.
- Evaluating allegations that the domestic violence perpetrator is also abusing the children.
- Evaluating allegations that the abused parent is abusing the children.
- Possible remedies for protection of children and abused parents.
- Enforceability of orders.
- Coordination among courts.

5.1 Domestic Violence and Child Abuse or Neglect

Domestic violence and child abuse or neglect often occur within the same family. Research suggests that as many as two-thirds of mothers of abused children are battered women. Results from a study of abused children and their mothers conducted at a major metropolitan hospital led its investigators to conclude that wife battering may be "the single most important context for child abuse." *Protecting Abused Children, Supporting Battered Women: A Model Policy for Child Protective Services Intervention,* 2:3 The Exchange at 1, 4, National Woman Abuse Prevention Project, Aug. 1988. Research also suggests that at least half of all battering husbands also batter their children, and the more severe the abuse of the mother, the worse the child abuse. Bowker, Arbitell, & McFerron, *On the Relationship Between Wife Beating and Child Abuse* in K. Yllo and M. Bograd (eds.), Perspectives on Wife Abuse, Newbury Park, Ca. Sage (1988). See also Chapter 1.

When domestic violence and child abuse or neglect coexist, the court must exercise special care to understand existing family dynamics in order to protect the abused parent and

children. For a variety of reasons, those dynamics can be complicated and concealed. For example, domestic violence victims may be reluctant to testify, may recant entirely, or may distort what occurred for fear of perceived reprisals or because they are concerned that their testimony will break up the family. Perpetrators often minimize their own actions and portray the court's intervention as an attempt to destroy the family. But the problems are not only problems of testimony. The bare facts, even if accurate, may be misleading. Consider an unemployed mother who is charged with neglecting her child by failing to provide sufficient food. Here, the mother appears neglectful. But perhaps this is not the whole story. What the court may not know is that the mother's abusing intimate partner controls all of the money, refuses to provide her with enough money to buy sufficient food, and will not allow her out of the home to work or go shopping. In this situation, the child is being neglected—and the court must respond—but the remedy for the neglect should be different because the neglect is caused by domestic violence, not maternal incompetence.

The purpose of this chapter is to inform the court generally of the unique and difficult issues that arise in protection order, custody, and child welfare cases where there is both domestic violence and child abuse or neglect.

5.2 Assuring the Child's Interests are Represented in Court Proceedings

An initial problem for the court to consider is how the child's interests are being represented in court. Children in violent homes obviously have a great stake in litigation where custody is at issue. In those cases, however, the parents may not be able to adequately represent the child's interests or needs—either because they have a conflict of interest or because they cannot see beyond their own need for safety (if abused) or control (if the abuser). As a preliminary matter, then, the court must determine how children will be represented in the case.

In cases under the Children's Code, the court must appoint a Guardian ad Litem (GAL) for the child.

In contested custody cases, the court has discretion to appoint a GAL for the child and may allocate the costs of the GAL between the parents. §40-4-8(A). Although this may be useful in some cases, not all parents can afford a GAL. Even when the court is able to appoint a GAL, the role of the GAL is not clearly defined: The statute allowing appointment does not define the roles and responsibilities of the GAL in domestic relations cases. A judge may look to the Children's Code, §32A-1-7, for guidance, but the differences between the divorce and child welfare contexts may limit the relevance of that statute.

Finally, under the Family Violence Act, the court does not have any authority to appoint a GAL in a protection order case at all.

Where there is little statutory guidance for the GAL or where there is no GAL, the judge's creativity and resourcefulness (in utilizing a court clinic or other independent community

resources) may provide the best guarantee that the child will be protected in these important and complicated cases.

5.3 Community Support Groups Can Assist the Court

Independent agencies can be invaluable to a court in these cases, especially when the child does not have his or her own GAL. Participants in the justice process that do not appear on behalf of a particular party may provide the court with more independent, unbiased information about a family's needs and functioning than any witness for a party could provide.

An obvious choice for such independent evaluation and reporting to the Court is a court clinic if the court has that luxury.

If the judicial district has Court Appointed Special Advocates (CASAs), these volunteers can provide excellent background to the court about a particular child or family. While CASA volunteers traditionally serve in abuse and neglect cases, they are usually available for custody matters involving domestic violence.

Schools are often able to provide the court with much needed information on a child's performance and the quality of a parent's interactions with the school (for example, whether the parent interacts in an appropriate manner with the school).

Domestic violence shelters can provide counseling for parents and children and can provide information about the court system to unrepresented parties.

Although courts have not traditionally collaborated with schools or shelters, such an approach is not entirely novel. Some courts have begun adopting the drug court model for use in domestic violence cases--merging the court and treatment providers for a team-based approach to solving family violence. For example, the 11th Judicial District has adopted a Domestic Violence Program that utilizes and collaborates with many service providers in the district. For more information on the 11th Judicial District's Domestic Violence Program, see: http://www.eleventhdistrictcourt.state.nm.us/programs/mckinley/dom_violence/.

5.4 Evaluating Allegations that the Domestic Violence Perpetrator Is Also Abusing the Children

In some cases where a parent abuses both the children and the other parent, the child abuse is actually instrumental behavior used to maintain coercive control over the abused parent. This type of child abuse may post-date the abuse of the other parent. Stark, E, & Flitcradt, A., *Women and Children at Risk: A Feminist Perspective of Child Abuse,* International Journal of Health Services, 18 (1) (1988). Examples of such abuse and neglect may include forcing the children to watch the abuse of the other parent, threatening to physically harm the child if the other parent does not act in a manner deemed appropriate by the perpetrator, abducting the child, threatening to kill the other parent in front of the child, sexually abusing

the child, and physically abusing the child. In cases where the perpetrator is abusing the children to control the other parent, the abuse is no less harmful to the children, but the court's response must be tailored appropriately to protect both the abused parent and the children.

5.5 Evaluating Allegations that the Abused Parent Is Abusing the Children

Courts evaluating charges that an abused parent is herself abusing the children should endeavor to understand the context of the parent's alleged abuse or neglect. What may be abusive or neglectful when there is no violence between the parents may be an attempt to cope with a violent environment. The court should consider whether the apparently neglectful or abusive behavior is protective when viewed in the context of the domestic violence. Of course, even where domestic violence explains certain behaviors, the child abuse or neglect cannot be excused. However, the court will have better information for fashioning an appropriate remedy if it is aware of the domestic violence.

Child neglect inflicted by the abused parent may be the result of attempts by the abused parent to protect both the child and him/herself from further abuse, whether through compliance with the perpetrator's demands or escape. An example of such abuse would be abandonment by the abused party. In such situations, the abused party flees the abusive situation and leaves the child for any of a number of reasons. For example, the abused parent may believe that by leaving she is protecting the child from the abuse itself or from witnessing violence. An abused parent may also flee in order to establish a safe home elsewhere for the child.

Another form of abuse in these situations can be concealment by the abused party. For example, an abused parent may flee the jurisdiction with the child, go into hiding, cut off communication with family and friends, or even create a new identity to escape the violence and protect the child. Other abuse may be the abused party's failure to protect the child from the abusive parent.

In other cases, the abused parent's abuse or neglect of the children cannot be seen as protective of the children even in the context of the domestic violence. In those cases, however, it is worth considering whether the abused parent has become so incapacitated by the domestic violence that she is unable to provide the necessary protection for the children. In such cases, the court may consider ordering victim counseling and parenting classes for the abused parent, among other things, but allowing the abused parent custody.

Finally, in response to the experience of being battered, some victims seek counseling or admission to psychiatric facilities. Rather than viewing such situations as indicating instability or permanent mental health problems, the court should consider whether such actions demonstrate recognition by the abused parent that she needs help and an ability to utilize resources when necessary. On the other hand, the court should also be aware that it is possible for a perpetrator to have the abused party involuntarily committed as a way to exert

control over that individual and to cast doubt on the abused party's mental health and parenting ability.

Given all of these variations, the court may need to consider whether the battered parent's appearance of instability is really her attempt to cope with the abuse, and equally important, whether it will interfere with the parent's ability to provide an environment that is in the best interest of the child once the abuse by the perpetrator is stopped. When any of these factors is present the court should determine if: (1) the factor is the result of abuse by one parent of the other, and (2) if so, whether the court can offer some form of intervention that will protect the abused parent from the perpetrator, thereby enabling the parent to act in the best interest of the child.

5.6 Possible Remedies for Protection of Children and Abused Parents

Child abuse intervention becomes much more complex when the adult committing the child abuse is either a perpetrator of domestic violence or an abused parent. Protection of a battered parent is a critical means of protecting the abused child. Research reveals that child abuse, whether by fathers or mothers, is likely to diminish once the abused parent has been able to access safety services and achieve separation from the violent parent. Giles-Sims, Jean, *A Longitudinal Study of Battered Children of Battered Wives*, Family Relations 34 (1985). Court-initiated interventions that provide the abused parent and the children adequate protection from the perpetrator are likely to further the goals of eliminating domestic violence in families and facilitating the adjustment and development of the children. This factor should be carefully considered in determining the most effective remedy.

Of equal importance to protecting the abused parent is early intervention. Early intervention aimed at protecting both the child and the abused parent from the perpetrator can stop the escalation of violence and enable the court to prevent these cases from proceeding to the point where termination of parental rights and/or foster care placement of the children are at issue.

Whether in a custody case, an abuse or neglect case, or a protection order case, the court should consider including each of the following among the remedies adopted to protect the children and the abused parent:

- Ordering child protective services workers to investigate abuse of one parent by another when alleged.
- Ordering the appropriate social service agency to work with the abused parent to develop a safety plan and support system that prevents the perpetrator from further attacking either the child or the parent.
- Ordering the abusive parent to vacate the premises.
- Ordering the perpetrator to obtain batterer's and other appropriate counseling.
- Ordering substance abuse treatment if the domestic violence occurs during periods of

intoxication.
- Ordering the abused parent into counseling for domestic violence victims in a child custody or abuse and neglect case.
- Ascertaining if a local victim's shelter can provide housing for the victim and the child.
- Ordering counseling for the child.
- Ordering supervised timesharing with the child.

When entering its order in a contested custody case, the court is required by law to consider whether there has been any domestic violence against a parent of the child or another household member before ordering joint custody. §40-4-9.1(B)(9). If the court determines that domestic abuse has occurred, the court must set forth findings that the custody or visitation ordered by the court adequately protects the child and the abused parent or other household member.

It should be noted that by the time the court is considering remedies, it is likely that the victim may have recanted. This is not unusual and may be the result of threats made by the perpetrator, feelings of guilt or loneliness by the victim, or the victim's financial instability without the perpetrator's income. The court must carefully craft and present its orders with this real possibility in mind. Victims often believe they have control of the charges (i.e., the ability to drop the charges). The Court should remind both parents that the victim does not have the power to drop the charges in criminal or child abuse cases, that the state brings the charge, and that only the state can decide whether to continue pursuing the charge. If the victim is allowed to dismiss a case (as in protection order or divorce cases), the child continues to be in danger.

When the victimized parent becomes reluctant to testify, recants, or minimizes earlier testimony about abuse, the court must proceed cautiously. While the court must protect the children, ordering parties apart may be futile. The parents may go back together regardless of the court's ruling. In fact, research suggests that victims typically attempt to separate from their batterers several times before permanently leaving a violent home. Many victim advocate groups contend that the courts must be sensitive to this fact as the victims will probably need the courts in the future and will not resort to the courts if they feel "re-victimized" by them. The court has a difficult balancing act in ensuring that, by allowing the parties back together, the child's best interest is being considered and served. In such cases, the court should strongly consider appointing a *guardian ad litem* for the child so that the court will have benefit of the child's interest as articulated by the court-appointed attorney. The court might also consider continued batterer's counseling and parenting classes, especially classes in which the abusive parent is observed interacting with the children.

5.7 Enforceability of Orders

When issuing an order intended to protect a child from an abusive or neglectful parent, the court should consider whether the parents will be capable of following the order. For instance, before denying an abusive parent visitation, the court should consider whether the

abused parent will allow the perpetrator to visit with the child even though such action would be a violation of the court order. Many victims cannot protect their children in such situations because of their own fear of violence. In such a case, the court should consider whether an alternative to denying visitation exists, such as supervised visitation. Of course, if the court is satisfied that neither party can adequately parent the children, the court may need to contact the Children, Youth and Families Department so that an abuse or neglect petition can be filed. Additionally, as noted in other sections of this book, if a no-visitation order is violated, the court must enforce the terms of the order. Failure to enforce such an order will serve to convince the batterer that he or she is actually in control of the visitation—encouraging that parent to continue violating the order and placing the child and abused parent at risk.

In some cases, reunification of the family may be the goal of court intervention. In child abuse or neglect cases where domestic violence exists, reunification of the abused parent and the children with the perpetrator may expose the children to continued abuse. Therefore, reunification should only be considered once the court is satisfied that the perpetrator no longer poses a threat to either the child or the abused parent. It is typical in cases where the court has ordered the perpetrator to leave the residence and the parties to be apart that the victim (presumably along with the perpetrator) will ask the court to allow them to reunite. The court should be very careful in determining whether previous court orders have been followed. If counseling has been ordered, but has not occurred, the court should consider denying the request until counseling has begun and assurance has been received from the counseling providers that the perpetrator's participation appears to be earnest.

5.8 Coordination Among Courts

In an effort to avoid conflicting custody and visitation orders issued by different courts, many judges find it useful to inquire whether the parties have appeared in other courts, and whether those courts have issued other orders. This may pose less of a problem in smaller judicial districts; however, it can be a serious problem for larger judicial districts where simultaneous domestic violence and domestic relations cases can be pending.

CHAPTER 6

DISSOLUTION OF MARRIAGE

This chapter covers:

- Child custody and support.
- Bankruptcy issues.
- Miscellaneous issues, such as medical insurance, reconciliation counseling, attorney's fees and permanent restraining orders.

6.1 Overview

New Mexico has recognized no fault divorce since 1933, and case law prohibits trial courts from considering fault when granting a divorce, dividing property, or awarding alimony. See *Lucas v. Lucas,* 95 N.M. 283 (1980); *Dubois v. Ryan,* 85 N.M. 575 (1973); *Garner v. Garner*, 85 N.M. 324 (1973); *Beals v. Ares*, 25 N.M. 459 (1919). Therefore, requests for financial consequences based on domestic violence must be addressed almost entirely by way of interspousal tort claims.

In divorce cases, property must be divided equally, *Ellsworth v. Ellsworth,* 97 N.M. 133 (1981), and alimony must be based on need and ability to pay without reference to fault. *Brister v. Brister,* 92 N.M. 711 (1979).

With respect to allocating debts, §40-3-9 provides that debts arising from a tort committed by one spouse are that spouse's sole and separate debts, as are "unreasonable debts," which are defined in §40-3-10.1 as being a debt created while living apart that did not benefit both spouses or their dependents. Other than these provisions, debts are also to be allocated equally, without regard to fault. For more on the interplay between divorce and interspousal torts, see below §§7.6 through 7.8

6.2 Child Custody and Support (see Chapter 4)

6.2.1 Custody

In cases where domestic violence is a factor, the court may wish to consider granting sole legal custody of the children to the nonabusing parent. At the least, the primary custodial parent should be given authority to make unilateral changes with respect to day-to-day matters such as health care, school, day care and recreation. In some cases the custodial

parent should be given authority to change the children's residence as well. Given that mediation is forbidden by statute in cases of domestic violence unless safeguards are in place, see §40-13-3(D), requiring joint decision making as is necessary with joint legal custody will seldom be appropriate.

6.2.2 Support

Child support plays a crucial role in enabling an abused parent to live and raise children in a nonviolent home. The lack of adequate, enforced child support may force an abused parent to return to or remain in a violent situation in order to provide for the children. While federal legislation has improved the level and enforcement of child support, unpaid child support and inadequate awards still pose a major problem in domestic violence cases.

Where domestic violence is present, the child(ren) may have special needs, different from those of child(ren) where there is no violence. The court may want to increase child support to provide for counseling, relocation expenses, emergency housing, extraordinary medical costs, and/or replacement of damaged or destroyed possessions. See §40-4-11.2 (1989) (authorizing upward deviation from guidelines for "circumstances creating a substantial hardship in the . . . subject children").

For further information, see Henry, Michael R. & Schwartz, Victoria S., *A Guide for Judges in Child Support Enforcement*, 2d ed., U.S. Dept. Of Health and Human Services, Office of Child Support Enforcement, Child Support Technology Transfer Project, National Council of Juvenile and Family Court Judges (primarily discusses 1984 Child Support Enforcement Amendments); Lefcourt, Carol H. & Relchler, Judith M., "Child Support" in *Women and the Law,* Clark Boardman, New York, 1988.

With respect to child support, New Mexico law does not provide any specific relief or direction related to fault, but some federal law is relevant:

- Federal statutes require states to improve levels and enforcement of child support orders. See Child Support Enforcement amendments of 1984 (42 U.S.C. §651 et seq.); Family Support Act of 1988, Pub. L. 100-485; 45 CFR §301 et. seq., implementing the Family Support Act of 1988.

- Persons applying for AFDC (now TANF) must assign their rights to child support to the state. See 42 U.S.C. §608(a)(3). However, violence may be a "good cause" exception to this assignment of rights to the state. See generally 45 CFR §260.54.

- Persons receiving AFDC (now TANF) must cooperate with authorities in establishing paternity and collecting child support unless they can demonstrate good cause. 42 U.S.C. §608(a)(2). Good cause may exist when the custodial parent fears harm by the other parent. See, e.g., 42 U.S.C. §654(29)(A)(i); 45 C.F.R. §260.54; see also *Cass County Welfare Dept. v Wittner*, 309 N.W. 2d 320 (Minn.1981) (good cause denied because violence too remote in time); *Bootes v. Pennsylvania*, 439 A. 2d 883 (Pa. 1982) (good cause denied because abuse was verbal only). For more discussion, see

Mannix, Freedman, & Best, (The Good Cause Exception to the AFDC Child Support Cooperation Requirement) Clearinghouse Review 339 (Aug/Sept 1987).

- Federal legislation requires states to apply child support guidelines as a rebuttable presumption in determining the amount of child support. 42 U.S.C. §667. Special needs of children may be considered, including counseling to help children deal with the emotional impact of violence. The Family Support Act requires orders entered before October 1989 to be brought into compliance with the guidelines. 45 CFR §302.56; 56 FR 22335 (May 15, 1991).

- Wage withholding for collection of child support orders is required by 42 U.S.C. §666. Enforcement of child support orders can be difficult when the non-custodial parent has been violent toward the custodial parent. Immediate wage withholding can improve enforcement. See §40-4-11(C) (1988) (allowing immediate wage withholding without an existing child support delinquency).

- Federal law strictly limits the disclosure of any information except for criminal enforcement or cooperation with other entitlements programs, including the recipient's address. Disclosure of information about an abused parent is not authorized. 42 U.S.C. §602(a)(7)(A)(i); 45 CFR 303.21.

- Federal tax exemptions for dependents are governed by 26 U.S.C. §152(e) (support test in case of child of divorced parents). See also *Macias v. Macias*, 1998-NMCA-170, ¶ 8, 126 N.M. 303 (holding that a court may allocate federal dependency exemptions between parents based on support payments made by the noncustodial parent).

6.3 Bankruptcy Issues

In making custody, support and property distribution orders, the court attempts to achieve what it believes is a just and equitable resolution. Some parties may defeat the goals of the judgment by filing petitions for bankruptcy. Because many types of debts are dischargeable in bankruptcy court, parties ordered to pay certain debts can avoid financial responsibility for them. Because the debts arose during the marriage, creditors may seek payment from the party not declaring bankruptcy.

Courts can take actions which reduce the likelihood of such results. For a fuller discussion of this issue, see Adkinson, Peter H., *The Bankruptcy Court Visits Superior Court*, Presentation to Superior Court Judge's Spring Conference, Vancouver, Washington, 1991.

A lien for payment of a debt is dischargeable in bankruptcy. See, e.g., *in re Stone*, 119 B.R. 222 (E.D. Wash., 1990). Alimony maintenance and child support payable to a spouse, former spouse or child are not dischargeable in bankruptcy. 11 U.S.C. 523(a)(5). The assignment of a support obligation makes it dischargeable unless the assignment is to the government for entitlement to public assistance. Amounts which are not clearly labeled as support such as a parent's obligation for a portion of schooling, day care, medical or other

expenses may be discharged unless established as support. The showing must be made in the bankruptcy court within 60 days and cannot be extended. An amount paid as alimony in a lump sum may be subject to challenge in bankruptcy court. The mere label may not be sufficient. If the maintenance is awarded in a lump sum due to domestic violence, a finding to that effect may help insure against discharge.

A lien awarded to a divorcing spouse to equalize the distribution of assets cannot be avoided by filing for bankruptcy. 11 U.S.C. §552(f)(1). *See e.g. Farrey v Sanderfoot,* 111 S. Ct. 1825 (1991); *In re Pederson,* 875 F.2d 781(9th Cir. 1989); *Owen v Owen,* 111 S. Ct. 1833 (1991). Concerning sanctions awarded for violations of protective order, *see e.g. Rayan v Dykeman,* 224 Cal. App. 3d 1629 (1990) (protective order not null and void as a result of bankruptcy; sanctions for failure to comply with protective order not dischargeable in bankruptcy).

Court practices which may reduce chances of debt discharge include:

- Making sure all parties are familiar with bankruptcy lien laws.
- Clearly indicating what is truly an order for support or maintenance.
- Not accepting stipulated orders that label debts as orders for support or maintenance without making appropriate findings concerning need for support.
- Where bankruptcy may be considered, not issuing liens to an abused party. Rather, order assets to be liquidated and cash paid to the abused spouse who would otherwise be given the lien.
- Retaining jurisdiction over alimony so even if it is not awarded at the time of divorce, it can be considered later if it becomes appropriate.

6.4 Miscellaneous Concerns

6.4.1 Medical Insurance

Courts should consider taking steps to avoid intimidation around filing claims and reimbursement for medical benefits. Orders that arrange direct access to the insurance carrier for the custodial parent or that allow the custodial parent to provide the insurance are possibilities to consider.

6.4.2 Reconciliation Counseling or Mediation Orders

Caution is urged with respect to addressing motions to compel reconciliation counseling when domestic violence is an issue. In New Mexico, mediation in domestic violence cases is forbidden by statute unless appropriate safeguards are part of the mediation process. §40-13-3(D). Motions for reconciliation counseling are suspect as being efforts to continue control over the abused spouse. Not all counselors have the special training necessary to balance

power and stop intimidation; if reconciliation counseling is attempted, a qualified counselor must be selected.

6.4.3 Awarding Attorney Fees

In cases where the abused party is without resources, special attention to the payment of attorney fees by the perpetrator can reduce control and intimidation factors. Attorney fee payments should be a part of all interim income division orders, but especially so in domestic violence cases.

6.4.4 Permanent Restraining Orders

In cases where on-going intimidation is a concern, the divorce decree can include a permanent order prohibiting domestic violence.

See, e.g. *Kreitz v. Kreitz*, 750 S.W. 2d 681 (Mo. 1988) (court could include a provision in divorce decree enjoining husband from entering the marital home at any time); *Mallin v. Mallin*, 541 N.E. 2d 116 (Oh. 1988) (court in divorce action can order protective order remedies including the issuance of a vacate order without the necessity of petitioner filing a protective order petition); *Stroschein v. Stroschein*, 390 N.W. 2d 547 (N.D., 1986) (the same judge may properly issue protective order and rule on divorce action); *Vogt .v Vogt*, 455 N.W. 2d 471 *(*Mn. 1990) (wife's protective order proceedings and husband's divorce proceedings may be consolidated).

CHAPTER 7

INTERSPOUSAL TORTS

This chapter discusses the following aspects of interspousal causes of action:

- Torts actions recognized by the courts of New Mexico and other jurisdictions.
- Statutes of limitations for various torts.
- Community property issues.
- Procedural issues.
- Claims after divorce.

7.1 Overview

Prior to *Flores v. Flores*, 84 N.M. 601 (Ct. App. 1973), New Mexico law gave defendants immunity from claims of interspousal torts. *Flores* eliminated immunity for intentional torts, holding that since the courts originally formulated the rule, it was up to the courts to change it if it was unwise.

Two years later the New Mexico Supreme Court confirmed and expanded *Flores* in *Maestas v. Overton*, 87 N.M. 213 (1975), a wrongful death case. *Maestas* abolished interspousal immunity for negligent or non-intentional torts.

Subsequently, *Hakkila v. Hakkila*, 112 N.M. 172 (Ct. App. 1991), limited the *Maestas* decision. The court adopted the commentary to Restatement 2d §895(F) in holding that "[t]he intimacy of the family relationship may . . . involve some relaxation in the application of the concept of reasonable care, particularly in the confines of home." For example, the *Hakkila* court explained that the court would probably not treat careless acts, such as if one spouse leaves his shoes in the middle of the floor and the other spouse trips on them or one spouse spills coffee on the other while tired, as interspousal negligent torts.

In New Mexico, the court may decide to raise the standard of proof in certain torts because of the "privilege" of particular (careless) conduct between spouses. *Hakkila v. Hakkila*, above. However, the contributory negligence of a husband is not imputed to a wife with respect to a negligent tort.

7.2 Interspousal Torts: Persons

7.2.1 Assault and Battery

An assault is defined as an "act by one person that creates a reasonable fear or imminent peril in the mind of another person when the other has the apparent ability to cause bodily injury to the other person." A battery is "any intentional, offensive, nonconsensual touching ranging from a brutal beating to a shove or a tap in a rude, insolent or angry manner." *Flores v. Flores*, above. For various reasons, many victims never follow through with an interspousal assault or battery tort action.

7.2.2 Intentional Infliction of Emotional Distress

Although the most common interspousal torts are assault and battery cases, the interspousal tort that is most often litigated at state appellate court levels is the tort of intentional infliction of emotional distress. This trend is explained by the relative simplicity of assault and battery cases, where the court's only responsibility is to determine whether the act actually happened and whether spousal immunity exists in the jurisdiction. Claims of intentional infliction of emotional distress, by contrast, require that the courts examine difficult and ambiguous public policy and legal issues.

The tort of intentional infliction of emotional distress usually accompanies a bodily injury that is so traumatic that the victim requires treatment for severe emotional and psychological damages. However, unlike some jurisdictions, New Mexico does not require a physical manifestation of the injury; severe emotional trauma is sufficient. See UJI 13-1628.

New Mexico does require that the spouse's conduct be "extreme and outrageous" in order to deter unmeritorious lawsuits. *Hakkila v. Hakkila*, above, is a good example of the high threshold that New Mexico courts require in a spouse's "extreme and outrageous" conduct. In *Hakkila*, the husband's actions towards his wife included assault and battery, demeaning remarks, screaming, refusal to have sexual relations, and other actions. The wife claimed to be temporarily emotionally disabled as a result of this abuse. The court, however, refused to rule in the wife's favor because of the concern of "opening the door too wide" to intentional infliction of emotional distress claims. Thus, *Hakkila* held that the husband's behavior was not sufficiently outrageous to justify damages for emotional distress.

7.2.3 Wrongful Death, Undue Influence, and Fraud

In addition to the torts of assault, battery, and intentional infliction of emotional distress, New Mexico also recognized the torts of interspousal wrongful death in *Maestas v. Overton*, above, and undue influence and fraud in factum in *Trigg v. Trigg*, 37 N.M. 296 (1933).

7.2.4 Tortious Infliction of a Venereal Disease

All states recognize that one sexual partner may be liable for transmitting a sexually transmitted disease to another partner. Although most tortious infliction of venereal disease claims involve herpes, experts expect that AIDS will become the most notable interspousal tort in this category.

Courts base liability for this tort on traditional theories of battery, tortious fraud, and negligence. Under the battery philosophy, even though the spouse consented to sexual relations, she based her consent on a mistaken belief. The spouse must prove that she would not have consented had she known of the venereal disease. Thus, the sexual act was equivalent to a nonconsensual touching.

Where the claim is based on tortious fraud, the plaintiff asserts that by definition, the marital relationship imposes a duty on the infected spouse to inform the other spouse of the disease. The basis of this claim is that the failure to disclose amounts to constructive fraud or misrepresentation.

Cases that involve traditional negligence theories focus on the duty of people with dangerous contagious diseases to warn others of the risk of infection. But most courts require proof that the infected person had actual or constructive knowledge of the ailment.

Where the spouse is unable effectively to employ theories of battery, tortious fraud, or negligence in a case of tortious infliction of a venereal disease, New Mexico has held that freely made sexual decisions between adults are not actionable in tort. *Padwa v. Hadley*, 127 N.M. 416 (Ct. App. 1999).

7.2.5 False Imprisonment

Although New Mexico recognizes the tort of false imprisonment, it has not yet decided a case involving a false imprisonment claim between spouses.

The tort of false imprisonment involves an unlawful interference with the personal liberty or freedom of movement of another, even if brief. “The restraint constituting false imprisonment may arise out of words, acts, gestures or similar means which induce reasonable apprehension that force will be used if the plaintiff does not submit and it is sufficient if they operate upon the will of the person threatened and result in a reasonable fear of personal difficulty or personal injuries.” *Martinez v. Sears, Roebuck & Co.*, 81 N.M. 371, 373 (Ct. App. 1970).

7.3 Interspousal Torts: Property

7.3.1 Breach of Fiduciary Duty and Constructive Fraud

In *Roselli v. Rio Communities Service Station, Inc.*, 109 N.M. 509 (1990), the New Mexico Supreme Court held that transfers and gifts to third parties without the consent of the other spouse are void. Punitive damages may be available to the victimized spouse where the breach is maliciously intentional, fraudulent or oppressive, or committed recklessly, or with a wanton disregard for the other spouse's rights. *Keuffer v. Keuffer & Santa Fe Designs*, 110 N.M. 10 (1990).

Furthermore, incurring a substantial business debt with the express non-consent of the other spouse may render the debt a separate debt because it is a breach of fiduciary duty in managing community property. *Fernandez v. Fernandez*, 111 N.M. 442 (Ct. App. 1991). In this situation, restraining orders are an appropriate remedy. *Greathouse v. Greathouse*, 64 N.M. 21 (1958).

Constructive fraud is a breach of a legal or equitable duty in a manner that is fraudulent because of its tendency to deceive others. While the victim need not prove intent to deceive, the facts must show that the results of the transaction are so inequitable that a court can infer that the opposing spouse must have committed a fraud. *In re Trigg*, 46 N.M. 96 (1942). A court can award damages for the interspousal tort of constructive fraud since it a type of fraud; similarly, a court can award damages for interspousal negligent representation. *Baber's Super Markets, Inc. v. Stryker*, 84 N.M. 181 (Ct. App. 1972); *State ex. Rel. Nichols v. Safeco*, 100 N.M. 440 (Ct. App. 1983).

7.3.2 Actual Fraud or Misrepresentation

In *Curtis v. Curtis*, 56 N.M. 695 (1952), the New Mexico Supreme Court held that fraud in factum may void a settlement. In addition, an independent action for damages for fraud or negligent misrepresentation may exist. A victim of fraud can also prove her claim where her spouse was silent when he had the duty to speak, and the wife relied on her husband's silence in a financial transaction. *Krupiak v. Payton*, 90 N.M. 252 (1977). Remedies for fraud or misrepresentation range from compensatory damages and punitive damages to injunctive relief, restitution, and recission. *Citizens Bank v. C & H Constr. & Paving Co.*, 89 N.M. 360 (Ct. App. 1976).

7.3.3 Intentional Destruction of Property

The New Mexico Supreme Court may deem intentional destruction of property as a separate tort where the wife may retain claim to one-half of the insurance proceeds under a community property insurance policy. *Delph v. Potomac Ins. Co.*, 95 N.M. 257 (1980).

7.3.4 Conversion

A conversion action may arise from the unlawful exercise of dominion and control over personal property belonging to another in defiance of the owner's rights or unlawful detention after demand. *Bowman v. Butler*, 98 N.M. 357 (Ct. App. 1982). Although New Mexico does not have an interspousal conversion case on the books, the present law would clearly be applicable with respect to separate property. The victimized spouse must show an unsuccessful demand for the return of the personal property.

7.4 Interspousal Torts: Other

7.4.1 Spousal Consortium

The New Mexico Supreme Court established a claim for spousal consortium in *Romero v. Abraham*, 117 N.M. 422 (1994). In *Romero*, the court found no merit in past arguments against spousal consortium in New Mexico that relied on the uncertain and indefinite nature of the claim. The court determined that because New Mexico courts for decades had recognized damages for non-physical injuries such as emotional distress, New Mexico courts would have no additional problems in assessing the damages in a spousal consortium case.

7.4.2 Custodial Interference

New Mexico does not yet have a case on this claim, but the interspousal tort of custodial interference will probably be recognized because New Mexico has a strong criminal custodial interference statute and New Mexico follows the Restatement of Torts. §30-4-4; Restatement of Torts 2d §700. However, emerging law indicates that visitation interference does not rise to the level of a tort.

7.4.3 Malicious Abuse of Process

Although New Mexico does not yet have a case where one spouse brought a malicious abuse of process claim against the other spouse, one may argue that such a claim may arise from a malicious criminal complaint or a false custody or child abuse claim. *Devaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, 124 N.M. 512. Similarly, New Mexico has no existing cases between spouses for the claims of Malicious Prosecution or Abuse of Process, which were combined to form the tort of Malicious Abuse of Process.

7.4.4 Libel and Slander

Although technically this claim exists between spouses, it is limited because of the privilege of spouses to make negative comments about each other. *Hakkila v. Hakkila*, above. However, the standard for non-married people is ordinary negligence in a libel and slander case. *Marchiondo v. Brown*, 98 N.M. 394 (1982).

7.4.5 Outrage

In *Padwa v. Hadley*, *above*, where the husband pursued a tort of outrage claim against his wife's paramour, the court held that the conduct must be "atrocious and utterly intolerable" and "beyond all possible bounds of decency." New Mexico follows the Restatement of Torts 2d, which sets the threshold at the very highest level for the courts to consider behavior actionable under the tort of outrage. Like the Restatement, *Padwa* recognizes that part of the price of living in a free and democratic society and enjoying personal liberties is the unwelcome side-effect of tolerating some offensive conduct as well as certain obnoxious and morally deviant behavior. See also the discussion of *Hakkila v. Hakkila*, above, §§7.1 & 7.2.2.

7.4.6 Prima Facie Tort

New Mexico recognizes the interspousal prima facie tort claim. The elements of this tort are: a) an intentional lawful act; b) an intent to injure the claimant; c) an injury; and d) the degree of justification or insufficient justification for the acts. This claim can arise, for example, from intentional but unjustified infliction of economic harm.

7.5 Statute of Limitations

In New Mexico, the statute of limitations for fraud and conversion is four years from the date of discovery by the injured party. §§37-1-4 and 37-1-7.

The statute of limitations for both intentional torts and intentional torts to a person or reputation is three years from the date of injury. §37-1-8. In addition, one must bring wrongful death claims within three years from the date of the death. §41-2-3.

In cases with latent injuries, New Mexico courts establish the "injury" on the date when the injury manifested itself in an objective manner and was ascertainable. *Crumpton v. Humana, Inc.*, 99 N.M. 562 (1983).

The statute of limitations is tolled in situations where there is fraudulent concealment of an injury to property, or a person breaches a confidential relationship with a duty to speak. *Hardin v. Farris*, 87 N.M. 143 (Ct. App. 1974).

7.6 Interspousal Torts and Divorce

7.6.1 Proceeds

As a community property state, any property in New Mexico that either spouse earns during the marriage is divided in half when the marriage is dissolved, with few exceptions. Generally, each spouse owns a one-half vested interest in community property earned by the other spouse during a marriage, and the couple must divide the community property equally in a divorce. The income, profits, rents and issues of separate property are separate and

belong to the owner. The court may order a transfer of extra community or separate property as lump sum alimony or child support in a divorce case. With respect to mixed property, if the parties can trace the source of the funds, it will be sufficient to establish the character of the funds in the absence of any claim of transmutation of the property. All division is "no fault" in New Mexico.

7.6.2 Characterization of Proceeds

New Mexico courts deem damages from intentional torts separate property. *Flores v. Flores*, above. In addition, damages for pain and suffering and loss of function are separate property. *Russell v. Russell (II)*, 106 N.M. 133 (Ct. App. 1987). Worker's Compensation proceeds may be separate property as well. *Richards v. Richards*, 59 N.M. 308 (1955).

As a general rule, debts created by a separate tort are separate debts. §40-3-9A(5). When one commits a separate tort, courts deem it "separate" when it is a tort that is not for the benefit of the marriage. *Dell v. Head*, 532 F.2d 1330 (10th Cir. 1976); *Delph v. Potomac Insurance Co.*, above.

In addition, damages received in a wrongful death of a child claim are separate property. §§40-3-9(A) and 41-2-3.

On the other hand, reimbursement for lost wages during the marriage and payment for medical expenses may be community property. *Russell v. Russell (II)*, above. However, a phrase in a general release indicating a waiver of claims or medical expenses indicates to the courts a community portion of a settlement. *Russell v. Russell (III)*, 111 N.M. 23 (1990). In addition, disability insurance claims are probably community property, if claimed under a policy where the couple pays the premiums with community funds.

7.6.3 Collection of Proceeds

One can collect separate debts created by a separate tort during one's lifetime against the tortfeasor's separate property and his one-half of the community property. §40-3-10. Furthermore, one can collect separate debts against a decedent's estate; thus, the surviving spouse's share of community property is also liable for community claims. §§45-2-804 and 45-3-101.

One cannot discharge debts for intentional torts in bankruptcy, and with respect to certain fraud claims that are tried before a court, claims may be barred by res judicata or will be non-dischargeable, as well. *In re Romero*, 535 F.2d 618 (10th Cir. 1976).

To the extent that there is a community claim for lost earnings, one may collect against all the community property, so that a tortfeasor is only liable for one-half of the amount recovered. §40-3-11.

7.6.4 Effect of Choice of Laws

New Mexico's new quasi-community property statute applies only to divorces where both parties are domiciled in New Mexico at the time of the divorce. §40-3-8(C) and (D). However, the New Mexico Supreme Court held that where one party is domiciled in another state, the normal choice of law rules apply; thus, if a spouse acquires property in another state, the law of the other state determines not only the character of the property, but the parties' rights in the property. *Hughes v. Hughes*, 91 N.M. 339 (1978).

Where a tort claim arose in another state and the parties moved to New Mexico, the other state's law may govern the proceedings even though New Mexico courts may hear the case.

7.7 Procedural Issues

7.7.1 Problems of Joinder and Overlap of Claims

A tort claim cannot be heard in a divorce proceeding because in New Mexico divorce is no-fault. *Hakkila v. Hakkila*, above. The *Hakkila* court reasoned that hearing a fault action with a divorce case would run counter to 60 years of no-fault divorce in New Mexico. In addition, a jury may be empaneled to hear the tort action, where a judge determines the equitable issues of divorce proceedings. If New Mexico chose to combine tort and divorce proceedings, it would be necessary to distinguish and determine what degree of mental distress was related to the divorce and what degree of distress arose out of the injury. Because emotional distress may be a consequence of marriage dissolution as well as injury, this division could be problematic.

The party claiming an interspousal tort should institute a separate suit. If the court does join the tort claim with the divorce, the court should bifurcate the trials. *Hakkila v. Hakkila*, (J. Donnelly, concurring).

7.7.2 Duplication of Claims and Separateness of Claims

Alimony awards for a spouse's inability to work may overlap with damages for lost wages or lost earning capacity. However, attorney's fees awarded under the divorce statute do not extend to the tort claim if joined with the divorce. *Hakkila v. Hakkila*, above.

Furthermore, the divorce case is not intended to offer remedies for injury. *Flores v. Flores*, above.

7.7.3 Res Judicata and Collateral Estoppel Problems Arising with Separate Claims

A claim for damages in an interspousal tort case may overlap with an alimony claim in a divorce case. However, the same issues will not necessarily be tried in the divorce case. If the court decides the dissolution case on the grounds of cruel and inhuman treatment, or if

the court addresses an insurance proceeds issue characterized as a tort under a community insurance policy, the court may decide some tort issues in the divorce case. *Delph v. Potomac Ins. Co.*, above. On the other hand, because the causation issues in a divorce claim differ from those in a personal injury claim, the resolution of a divorce issue may not preclude the decision of the tort issue in a separate case. *Hakkila v. Hakkila*, above.

New Mexico modeled its joinder and counterclaim rules after the Federal Rules of Civil Procedure. Therefore, whether any counterclaim is necessary would depend on whether a court would decide that the claim arose out of the same transaction or occurrence as the divorce. Rule 1-013. However, a party may certainly join alternate legal or equitable claims that one spouse has against the other. Rule 1-018.

One way to address an overlapping interspousal tort claim in a divorce case is to list it as an inchoate or pending claim in any settlement or decree as property of the party making the claim. In addition, the decree should list a portion of tort proceeds or a portion of all property that a party receives from proceeds as separate property. When an interspousal tort claim is filed with the divorce, the court should consider ordering a separate trial or severance.

The court may divide proceeds if monetary or other awards are granted after the divorce is final. Recovery of damages for interspousal torts in a divorce may come through payment of bills, wage reimbursements, and heath insurance company reimbursements, as well as insurance coverage.

The court should never underestimate the importance to the victim of receiving justice. Sometimes the injured party is even more concerned with having her day in court and being vindicated then she is with receiving monetary damages from her spouse. Having the justice system condemn the spouse for his tortious behavior can help some injury victims put their lives back together. The court must be aware of this possibility, which may explain why some plaintiffs proceed with interspousal tort claims even when the likelihood of recovery is small.

7.8 Claims after Divorce

Many interspousal tort cases arise in conjunction with a divorce or after a divorce. If a victim makes a claim after the court has dissolved the marriage, the other spouse is likely to raise the doctrines of res judicata, collateral estoppel, or waiver as a defense. The court may have to rule on whether these doctrines will bar a tort action between former spouses after a divorce proceeding.

Res judicata and collateral estoppel preclude the relitigation of matters that the parties actually litigated in a previous action. Waiver involves the surrender of a legal right. Although there is not a New Mexico case directly on point, courts that have addressed this issue generally have rejected the argument that these doctrines bar a subsequent tort claim against a prior spouse. See generally Lemon, Nancy K.D., *Domestic Violence Law* 248-54 (2001).

Some reasons for allowing post-dissolution tort litigation include:

- Parties do not base the tort claim on the same underlying issues or claims involved in the divorce action.

- Current permissive and noncompulsory joinder rules allow a party to choose when to file a tort claim.

- Evidence and procedure rules required to prove a tort case are different from those in a dissolution proceeding.

- The system preserves the plaintiff's right to a trial by jury in tort claims, which may not be available in divorce.

- Divorce actions would become increasingly complex with the addition of tort claims. As a result, divorces would be too lengthy, delaying the resolution of custody and support issues, which would not be in the best interest of the children.

CHAPTER 8

CRIMES INVOLVING DOMESTIC VIOLENCE

This chapter covers:

- Criminal conduct under the Family Violence Protection Act.
- Crimes Against Household Members Act.
- Harassment and Stalking Act.
- The Victims of Crime Act.
- Arrests without warrants at domestic disturbances.
- Free forensic exams for victims of sexual crimes.

8.1 Introduction

New Mexico has several laws that govern criminal acts of domestic violence: the Family Violence Protection Act, §40-13-1 et seq., the Crimes Against Household Members Act, §30-3-10 et seq., and the Harassment and Stalking Act, §30-3A-1 et seq. Like the Family Violence Protection and the Crimes Against Household Members Acts, the Harassment and Stalking Act outlines criminal penalties for certain defined behaviors. However, the Harassment and Stalking Act differs from the other two in that the victims do not have to be family or household members. These Acts are discussed generally in the following sections.

Domestic violence crimes are not limited to assault and stalking offenses. Domestic abuse takes many forms, so that any crime can be a domestic violence crime if perpetrated within a pattern of controlling behavior directed against an intimate partner. Moreover, domestic violence crimes are not limited to crimes directed against the person of the offender's intimate partner. Abusers may attempt to exercise control by using behavior directed against their partners' property, animals, family members, or associates. Although not discussed in this chapter, the following crimes can be associated with domestic violence:

- Use of Telephone to Terrify, Intimidate, Threaten, Harass, Annoy or Offend, §30-20-12.
- Kidnapping and False Imprisonment, §30-4-1 et seq.

- Sexual Offenses, §30-9-11 et seq.
- Injury to Pregnant Woman, §30-3-7.
- Child Abuse and Neglect, §32A-4-1 et seq.
- Bribery or Intimidation of a Witness; Retaliation Against A Witness, §30-24-3.
- Interference with Communications, §30-12-1.
- Cruelty to Animals; Extreme Cruelty to Animals, §30-18-1.
- Criminal Damage to Property, §30-15-1.

Municipal ordinances also may address crimes involving domestic violence.

8.2 Criminal Conduct Under the Family Violence Protection Act

8.2.1 **Overview** (see also Chapters 2 and 3)

The Family Violence Protection Act, §40-13-1 et seq., allows a victim of domestic abuse to petition the district court for an order of protection. Violation of an order of protection is a misdemeanor subject to prosecution in magistrate or metropolitan court. The remedies in the Act are in addition to any other civil or criminal remedies available to the petitioner.

While the district courts have initial jurisdiction in issuing orders, the magistrate and metropolitan courts have important responsibilities in imposing criminal and other sanctions. This section outlines those responsibilities as described in the Act.

8.2.2 **Definitions** (§40-13-2)

The court defines domestic abuse as any incident by a household member against another household member that results in:

- physical harm;
- severe emotional distress;
- bodily injury or assault;
- a threat causing imminent fear of bodily injury by any household member;
- criminal trespass;
- criminal damage to property;
- repeatedly driving by a residence or work place;
- telephone harassment;
- stalking;

- harassment; or
- harm or threatened harm to children.

A household member means a:

- spouse or former spouse;
- family member, including a relative, parent, current or former stepparent, current or former in-law, child or co-parent of a child; or
- person with whom the petitioner has had a continuing personal relationship.

Cohabitation is not necessary to be considered a household member.

An order of protection is an order granted by the district court for the protection of victims of domestic abuse.

8.2.3 Orders of Protection (§§40-13-3 through 40-13-6)

Violation of an order of protection issued by a district court judge is itself a criminal offense—even if the conduct that violates the order of protection would not otherwise be against the law. It is therefore important for magistrate and metropolitan court judges to understand the fundamentals of orders of protection, since these judges may be called upon to punish offenders who violate them. Also, falsifying a petition for an order of protection constitutes perjury, a fourth degree felony, which can serve as a sanction for abuse of process.

For more detailed information on orders of protection, please refer to Chapters 2 and 3 of this Benchbook.

Issuance

When a victim of domestic abuse petitions the district court for an order of protection, commonly called a restraining order, the petitioner must submit forms filled out under oath or accompanied by a sworn affidavit outlining the domestic abuse.

Once the court clerk files the Petition for Order of Protection, the court may grant an *ex parte* temporary order of protection (an order granted on behalf of one party without notice to the opposing party). §§40-13-3 through 40-13–6. The order must be personally served on the respondent, unless the respondent or his/her attorney was present when the order was issued. The court must hold a temporary hearing within 10 days after the court clerk has filed the temporary order.

If the petition for an order of protection is denied, the court must serve notice on the parties and hold a hearing within 72 hours. If notice cannot be served within 72 hours, the court shall automatically extend the Temporary Order of Protection for 10 days.

After the court holds a hearing on the question of continuing the temporary order and if the court finds that domestic abuse has occurred against the petitioner, the district court must enter an order of protection that orders the respondent to refrain from abusing the petitioner or any other household member.

The courts of every state and most Indian tribes will grant full faith and credit to the enforcement of these orders. 18 U.S.C. §2265.

An alleged victim of domestic abuse is not required to pay for filing a criminal charge against an alleged abusing household member, nor for issuance or service of a warrant, witness subpoena, or a protection order.

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Once the district court determines that domestic abuse has occurred, the court must enter an order of protection that restrains the respondent from abusing the petitioner or any other household member. Orders of protection involving custody or support are effective for up to six months.

The order must specifically describe the acts that the restrained party must or must not do. The order may include:

- Residence provisions, including granting the petitioner sole possession of the residence or ordering the restrained parties to provide temporary alternative housing for the petitioner and any children;
- Custody provisions, including awarding temporary custody and providing visitation rights, child support and temporary support for the petitioner;
- No-Contact provisions, including a ban on respondent contacting the petitioner and imposing a specific distance that the restrained party must stay away from the petitioner;
- Property provisions, including restraining the parties from transferring, concealing, encumbering or disposing of property owned solely or jointly;
- Provision for payment of restitution to the petitioner for losses resulting from respondent's conduct, such as replacements or repairs, medical and counseling expenses, lost wages and costs of seeking temporary shelter;
- A requirement that the respondent participate in professional counseling programs; and
- Other injunctive relief as necessary for protection.

The order also must contain a notice that violation of any its provisions constitutes contempt of court that may result in a fine or imprisonment or both.

Violation of an Order of Protection as a Criminal Offense (§40-13-6)

Although violation of a court order in most other types of cases is treated as contempt of

court, the Family Violence Protection Act imposes additional consequences under the criminal law for violation of an order of protection. This benchbook discusses generally the enforcement of protection orders in Chapter 3. For purposes of this chapter on criminal law, the criminal law implications for such conduct are briefly outlined.

Arrest. Under the statute, a peace officer must arrest without a warrant and take into custody a person who the officer has probable cause to believe has violated an order issued under the Act. In addition to charging the person with violating an order of protection, a peace officer must file all other possible criminal charges arising from the incident of domestic abuse when probable cause exists for other charges.

Conviction and Sentencing. Violation of an order of protection is chargeable as a misdemeanor in district, magistrate or metropolitan court. Sentencing for a first offense is governed by §31-19-1, which sets the penalty for misdemeanors at imprisonment for less than one year and a fine not more than $1000. For a second or subsequent conviction of violating an order of protection, the offender must be sentenced to at least 72 consecutive hours of jail. This sentence cannot be suspended, deferred or taken under advisement.

Restitution and Counseling. In addition to any other punishment provided in the Act, the court must order the convicted person to:

- Make full restitution to the party injured by the violation of the order of protection; and
- Participate in and complete a program of professional counseling, at the person's own expense if possible.

8.3 Crimes Against Household Members Act

8.3.1 Overview

The Crimes Against Household Members Act, §30-3-10 et seq., creates assault and battery crimes when committed against household members. Although the criminal penalties are the same as under the general assault and battery statutes, there are several reasons prosecutors may choose to proceed under this Act when the victim is a household member:

- Appellate Review is On-the-Record, Not De Novo: In the Metropolitan Court, prosecutions under the Act are defined as crimes of domestic violence. §34-8A-6. Appeals from Metropolitan Court convictions under this Act are not de novo trials, as with convictions under the general assault and battery statutes, but are appellate reviews of the record below. §34-8A-6; *State v. Trujillo*, 1999-NMCA-003 (holding that a defendant convicted of simple battery [not battery of a household member] in Metropolitan Court is entitled to a de novo trial, not on-record review, even if the battery was clearly committed against a family member). Law enforcement agencies can record convictions under the Act to determine the number of convictions for assault and battery where the victim is a

household member.

- A peace officer may make an arrest without a warrant at the scene of a domestic disturbance when the officer has probable cause to believe that the perpetrator has committed an assault or battery upon a household member. §31-1-7.

8.3.2 Definitions (§30-3-11)

Household member means a:

- Spouse or former spouse;
- Family member, including a relative, parent, current or former step-parent, current or former in-law, or co-parent of a child; or
- Person with whom the person has had a continuing personal relationship.

Cohabitation is not necessary for a person to be considered a household member.

A child, however, is not a "family member" within the meaning of this statute, even though children are included within that definition in the Family Violence Protection Act and other laws. *State v. Stein*, 1999-NMCA-065.

8.3.3 Crimes

Assault (§30-3-12)

Assault against a household member consists of:

- An attempt to commit a battery against a household member; or
- Any unlawful act, threat or menacing conduct that causes a household member to reasonably believe that he or she is in danger of receiving an immediate battery.

This crime is a petty misdemeanor.

Aggravated Assault (§30-3-13)

Aggravated assault against a household member is defined as:

- Unlawfully assaulting or striking at a household member with a deadly weapon; or
- Willfully and intentionally assaulting a household member with intent to commit any felony.

This crime is a fourth degree felony.

Assault with Intent to Commit a Violent Felony (§30-3-14)

Assault against a household member with intent to commit a violent felony consists of any person assaulting a household member with intent to:

- Kill;
- Commit murder;
- Commit mayhem;
- Commit criminal sexual penetration in the first, second or third degree;
- Rob;
- Kidnap;
- Falsely imprison; or
- Burglarize.

This crime is a third degree felony.

Battery (§30-3-15)

Battery against a household member consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner.

This crime is a misdemeanor, increased from a petty misdemeanor for crimes committed after July 1, 2001.

Aggravated Battery (§30-3-16)

Aggravated battery against a household member consists of the unlawful touching or application of force to the person of a household member with intent to injure that person or another.

This crime is misdemeanor if it is committed by inflicting an injury that is not likely to cause death or great bodily harm, but that does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body.

This crime is a third degree felony if it is committed:

- By inflicting great bodily harm;
- By using a deadly weapon; or
- In any manner whereby great bodily harm or death can be inflicted.

8.4 Harassment and Stalking Act

8.4.1 Overview

The Harassment and Stalking Act, §30-3A-1 et seq., defines the crimes of harassment and stalking and provides criminal penalties. Generally, harassment is a pattern of conduct that is intended to annoy, alarm or terrorize someone and that would cause a reasonable person to suffer substantial emotional distress. Stalking is a pattern of conduct, with specified acts, that would cause a reasonable person to feel frightened, intimidated or threatened. This Act does not require that the victim be a family or household member of the perpetrator. See UJI 14-330 (essential elements of Harassment); UJI 14-331 (essential elements of Stalking); UJI 14-332 ("household member" defined for stalking); UJI 14-333 (essential elements of Aggravated Stalking).

8.4.2 **Harassment** (§30-3A-2)

Harassment consists of knowingly pursuing a pattern of conduct that:

- Is intended to annoy, seriously alarm or terrorize another person;
- Would cause a reasonable person to suffer substantial emotional distress; and
- Serves no lawful purpose.

Harassment is a misdemeanor.

8.4.3 **Stalking** (§30-3A-3)

Stalking consists of knowingly pursuing a pattern of conduct that:

- Would cause a reasonable person to feel frightened, intimidated or threatened;
- Is intended to:
    - place another person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, or
    - cause a reasonable person to fear for his or her safety or the safety of a household member; and
- Includes the commission of one or more of the following acts on more than one occasion:
    - following another person in a place other than the stalker's residence;
    - placing another person under surveillance by being outside the person's residence, school, workplace, vehicle or any other place frequented by the person, other than the stalker's residence; or
    - harassing another person.

For purposes of this section of the Act, "household member" means a:

- Spouse or former spouse;
- Family member, including a relative, parent, current or former step-parent, current or former in-law, child or co-parent of a child; or
- Person with whom the victim has had a continuing personal relationship.

Cohabitation is not necessary for a person to be considered a household member.

Stalking is a misdemeanor for a first offense, and a fourth degree felony for a subsequent offense. In addition to any punishment imposed under this section, the court must order a person convicted of stalking to participate in and complete a program of professional counseling at his or her own expense.

8.4.4 **Aggravated Stalking** (§30-3A-3.1)

The offense of stalking becomes aggravated when accompanied by any of four additional factors:

- Knowingly violating a permanent or temporary order of protection issued by a court (except that mutual violations of such orders may constitute a defense);
- Violating a court order setting conditions of release and bond;
- Possessing a deadly weapon; or
- Stalking a victim who is under sixteen years old.

Aggravated stalking is a fourth degree felony for a first offense and a third degree felony for a subsequent offense. In addition to any punishment imposed under this section, the court must order a person convicted of Aggravated Stalking to participate in and complete a program of professional counseling at his or her own expense.

Note that if an object is not a "deadly weapon" listed in §30-1-12(B), the prosecution must also prove intent to use the object as a weapon to convict of Aggravated Stalking. *State v. Anderson*, 2001-NMCA-027, ¶ 32, 130 N.M. 295.

8.4.5 Exceptions to Harassment and Stalking Provisions

As stated in §30-3A-4, this Act does not apply to:

- Picketing or public demonstrations that are lawful or that arise out of a bona fide labor dispute; or
- A law enforcement officer in the performance of the officer's duties.

8.5 The Victims of Crime Act (§§31-26-1 to 31-26-14)

The Victims of Crime Act outlines the rights and responsibilities of alleged victims of certain violent crimes. It also outlines the duties of law enforcement, the prosecutor's office, and the court toward the alleged victim when investigating, prosecuting, and trying these violent crimes.

8.5.1 Application of the Victims of Crime Act

The Victims of Crime Act applies to alleged victims of the following crimes:

- Negligent Arson Resulting in Death or Bodily Injury;
- Aggravated Arson;
- Aggravated Assault;
- Aggravated Battery;
- Dangerous Use of Explosives;
- Negligent Use of a Deadly Weapon;
- Murder;
- Voluntary Manslaughter;
- Involuntary Manslaughter;
- Kidnapping;
- Criminal Sexual Penetration;
- Criminal Sexual Contact of a Minor;
- Armed Robbery;
- Homicide by Vehicle;
- Great Bodily Injury by Vehicle;
- Abandonment or Abuse of a Child;
- Stalking or Aggravated Stalking;
- Aggravated Assault Against a Household Member;
- Assault Against a Household Member with Intent to Commit a Violent Felony;
- Battery Against a Household Member; and
- Aggravated Battery Against a Household Member.

8.5.2 Victims' Rights Under the Act

Under the Act, an alleged victim has the right to:

- Be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;
- Timely disposition of the case;
- Be reasonably protected from the accused throughout the criminal justice process;
- Notification of court proceedings;

- Attend all public proceedings the accused has the right to attend;
- Confer with the prosecutor;
- For cases filed before July 1, 2005: Make a statement to the court at sentencing and at any post-sentencing hearings for the accused;
- For cases filed on or after July 1, 2005: Make a statement to the court at *any scheduled court proceeding* regarding the victim's rights under the Act, H.B. 692, 47th Leg., Reg. Sess. (N.M. 2005);
- Restitution from the person convicted of the criminal offense that caused the victim's loss or injury;
- Information about the conviction, sentencing, imprisonment, escape or release of the accused;
- Have the prosecutor notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work for good cause;
- Promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecutor, unless there are compelling evidentiary reasons for retaining the victim's property; and
- Be informed by the court at a sentencing proceeding that the offender is eligible to earn meritorious deductions from the sentence imposed and the amount of meritorious deductions that may be earned by the offender.

A victim may exercise his or her rights under this Act only if he or she:

- Reports the criminal offense within five days of the occurrence, unless the prosecutor determines that the victim had a reasonable excuse for failing to do so;
- Provides the prosecutor with current and updated information regarding the victim's name, address, and telephone number; and
- Fully cooperates and fully responds to reasonable requests by law enforcement agencies and attorneys.

The rights and duties established under this Act take effect when a suspect is formally charged by a prosecutor with committing a criminal offense against the alleged victim. The rights and duties remain in effect until final disposition of the court proceedings.

An alleged victim may designate a "victim's representative" to exercise all rights provided under the Act. An alleged victim may revoke such designation of a victim's representative at any time.

8.5.3 Law Enforcement Duties Under the Act

Law Enforcement Officers have the following specific duties under the Victims of Crime Act. Law Enforcement Officers must:

- Inform the victim of medical services and crisis intervention services available to victims;

- Provide the victim with the police report number for the criminal offense and a copy of the following statement: "If within thirty days you are not notified of an arrest in your case, you may call (telephone number for the law enforcement agency) to obtain information on the status of your case."; and

- Provide the victim with the name of the district attorney for the judicial district in which the criminal offense was committed and the address and telephone number for that district attorney's office.

8.5.4 Prosecutors' Duties Under the Act

District Attorneys also have specific duties under the Victims of Crime Act, specifically:

- Within seven working days after a district attorney files a formal charge against the accused for a criminal offense, the district attorney shall provide the victim of the criminal offense with:

    - A copy of Article 2, §24 of the N.M. Constitution, regarding victims' rights;
    - A copy of the Victims of Crime Act;
    - A copy of the charge filed against the accused for the criminal offense;
    - A clear and concise statement of the procedural steps generally involved in prosecuting a criminal offense; and
    - The name of a person within the district attorney's office whom the victim may contact for additional information regarding prosecution of the criminal offense.

- For cases filed before July 1, 2005: If requested by the victim, the district attorney's office shall provide the victim with oral or written notice, in a timely fashion, of a scheduled court proceeding attendant to the criminal offense.

- For cases filed on or after July 1, 2005: The district attorney's office *must* provide the victim with timely oral or written notice of a scheduled court proceeding attendant to the criminal offense—whether or not the victim requests such information. H.B. 692, 47th Leg., Reg. Sess. (N.M. 2005).

8.5.5 The Court's Duties Under the Act

According to a new section of the Act, passed and signed during the 2005 legislative session, in cases that fall under the Act that are filed on or after July 1, 2005, the Court must:

- Inquire on the record whether a victim is present for the purpose of making an oral statement or submitting a written statement respecting the victim's rights;
- If the victim is not present, the court must inquire on the record whether the

prosecutor has made an attempt to notify the victim of the proceeding. If the prosecutor cannot verify that an attempt has been made, the court must:

- Reschedule the hearing; or
- Proceed with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement; and
- Order the prosecutor to notify the victim of the rescheduled hearing.

H.B. 692, 47th Leg., Reg. Sess. (N.M. 2005).

Note, however, that nothing in the Act requires "the court to continue or reschedule any proceedings if [doing so] would result in a violation of a jurisdictional rule." H.B. 692, §1(C), 47th Leg., Reg. Sess. (N.M. 2005).

8.6 Related Provisions

8.6.1 Arrests Without Warrants at Domestic Violence Disturbances

Under §31-1-7, a peace officer may arrest and take into custody without a warrant a person when:

- The officer is at the scene of a domestic disturbance; and
- Has probable cause to believe that the person has committed an assault or a battery upon a household member.

Note, however, the discussion in Section 3.3.1 of this Benchbook regarding possible Constitutional problems with warrantless arrests made pursuant to §31-1-7.

Household member means a:

- Spouse or former spouse;
- Family member, including a relative, parent, current or former step-parent, current or former in-law, child or co-parent of a child; or
- Person with whom the victim has had a continuing personal relationship.

Cohabitation is not necessary for a person to be considered a household member.

The peace officer may remain with the victim and assist the victim in getting to a shelter or receiving medical attention, regardless of whether an arrest is made.

8.6.2 Free Forensic Exams for Victims of Sexual Crimes

The Sexual Crimes Prosecution and Treatment Act, which applies to sexual offenses in §§30-9-10 through 30-9-16 of the criminal code, is designed to promote effective law enforcement and prosecution of sexual crimes, assist community victim treatment programs, provide interagency cooperation and training, and encourage proper handling and testing of evidence. One of the Act's requirements is that the director of the mental health division of the state Department of Health, or a designee, must provide free forensic medical exams to victims of sexual crimes, or arrange for victims to obtain these exams free, or reimburse victims for the cost of these exams. §29-11-7.

8.6.3 Fee Waiver for Certain Crime Victims (§§ 30-1-15 and 40-13-3.1)

The following costs are waived for the alleged victims of certain crimes:

- the cost of filing a criminal charge against an alleged perpetrator; and
- the cost of issuing or serving a warrant, witness subpoena, or protection order.

The fee waiver applies to alleged victims of the following crimes:

- sexual offenses described in §§30-9-11 through –14 and 30-9-14.3;
- crimes against household members described in §§30-3-12 through-16;
- harassment, stalking and aggravated stalking described in §§30-3A-2 through –3.1; and
- violation of an order of protection described in §40-13-6(E).

CHAPTER 9

CONDITIONAL PRETRIAL RELEASE IN CRIMINAL PROCEEDINGS

This chapter covers:

- Procedures for issuing conditional release orders.
- Factors to consider in determining conditions of release.
- Contents of conditional release orders.
- Modification of conditional release orders.
- Enforcement proceedings for violations of conditions of release.
- Denying bond.

9.1 Overview

In every criminal proceeding, one of the first responsibilities of the judge is to set conditions for pretrial release of the accused. Of course, as in any criminal case, the accused is always entitled to a presumption of innocence. Moreover, the New Mexico Constitution entitles a defendant to release on bail except in certain defined circumstances. While the controlling legal standards for pretrial release are thus no different when domestic violence is charged, the judge should be careful to consider some of the unique dynamics that often exist in such situations when applying those standards. In particular, the judge should explore factors in each case that may indicate a danger to the safety of the alleged victim or others in the community, in accordance with the applicable Rules of Criminal Procedure. While release of the defendant pending trial is always the rule, the judge should go further to consider appropriate safeguards where the facts indicate the presence of danger.

While the relative danger posed by each individual defendant will vary, studies have shown a statistically increased risk for re-offense or obstruction of justice by domestic violence offenders during the period between arrest and trial. U. S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Factbook, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, p. 15 (March 1998); Herrell & Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile and Family Court Journal 32 (1990).

Two reasons for this increased risk are:

- The alleged perpetrator of a domestic violence crime generally has greater access to the victim than does the alleged perpetrator of stranger violence. Domestic violence perpetrators are likely to live with their victims or to have regular contact with them for purposes such as child visitation.

- Domestic violence is usually motivated by the abuser's desire to control the victim. Accordingly, such abusers may resort to violence to regain the control that is lost when their behavior leads to criminal charges.

Although Article II, §13 of the New Mexico Constitution entitles the defendant to bail except in limited circumstances (see §9.7 below), the judge can provide the alleged victim some protection from re-assault or coercion if circumstances suggest that possibility. The judge does this through a pretrial release order with conditions that restrict the defendant's access to the alleged victim. This chapter is primarily concerned with the issuance of such orders. It addresses the following topics as they relate to *adult* defendants:

- The substantive and procedural requirements for issuing a conditional release order.

- Practical concerns that commonly arise in setting release conditions in cases involving allegations of domestic violence, including the risk factors indicating that a defendant is likely to kill or seriously harm the alleged victim.

- The substantive and procedural requirements for amending or modifying a conditional release order.

- Common victim concerns with conditional pretrial release orders.

- The procedures for enforcing a conditional release order that has been violated.

- The circumstances under which bail may be denied.

9.2 Procedures for Issuing Conditional Release Orders

Note: For general information on conditional release pending trial, see the *New Mexico Magistrate and Metropolitan Court Benchbook*, Section 2.8; the *Municipal Court Benchbook*, Section 3.3; and the *Municipal Court Bond Book*, Part VII. All are available on the Judicial Education Center website, http://jec.unm.edu.

As in every other criminal case, each court issues orders for conditional pretrial release under the applicable court rule. These are Rule 5-401 et seq. (district courts); Rule 6-401 et seq. (magistrate courts); Rule 7-401 et seq. (metropolitan court); and Rule 8-401 et seq. (municipal courts). For the purpose of this chapter, all these rules are identical in all but a few respects. For simplicity, therefore, further references to these rules in this chapter will be

to the district court rule, Rule 5-401 et seq., except where the corresponding sections differ for limited jurisdiction courts.

Under Rule 5-401A, the court must order the release of any person who is entitled to bail under Article II, §13 of the New Mexico Constitution, either on personal recognizance or upon execution of an unsecured appearance bond, unless the court determines that such release will not reasonably assure the appearance of the accused or "will endanger the safety of any other person or the community." See Section 9.7 for a discussion of the Constitutional provision. If the court makes such a determination, the rule permits the court to impose such conditions as "will reasonably assure . . . the safety of any person and the community."

Paragraph A of the rule requires the court to set the bond at the least burdensome level, of the three alternatives set forth in the rule, needed to assure the defendant's appearance and the safety of others. Any discussion of the issues that arise in setting the amount or form of money bail is beyond the scope of this Benchbook. Limited jurisdiction judges may refer to the *New Mexico Magistrate and Metropolitan Court Benchbook*, Section 2.6; the *Municipal Court Benchbook*, Chapter 3; or the *Municipal Court Bond Book*, Parts II through V, for further guidance on this topic. All of these resources are available online at the Judicial Education Center website, http://jec.unm.edu, under "Legal Resources." Because domestic violence is at least as serious as violence between strangers (if not more so), however, bail should be set consistent with other offenses.

Paragraph C of the Rule offers a list of additional conditions that the court may impose upon the defendant, either when authorizing, or at any time during, the defendant's pre-trial release. These additional conditions are listed below in Section 9.4.1. Given the dynamics of typical domestic violence cases, the court should be very careful to consider whether any of these additional conditions should be imposed under the circumstances of the individual case, to "reasonably ensure the safety" of the alleged victim, any children, or others.

The discussion in this section outlines the issuance procedures for conditional release orders as set forth in the rules of criminal procedure. This discussion focuses on issues specific to domestic violence cases. For more information on the issuance of conditional release orders in general, limited jurisdiction judges may refer to the *New Mexico Magistrate and Metropolitan Court Benchbook*, Section 2.8; the *Municipal Court Benchbook*, Section 3.3; or the *Municipal Court Bond Book*, Part VII.

9.2.1 Setting Conditions Early

Bond conditions may be imposed at the time of the defendant's first appearance in court or at any time during the pendency of the criminal case. See, e.g., Rule 5-401(A), (E), (F). Where the judge sees indications suggesting that the defendant may either place the alleged victim or others in danger or attempt to influence their testimony, the judge may direct some additional cautions about the conditions of release toward the accused even at this early stage in the proceedings. The judge could, for example, state to the defendant and the alleged victim that coercion and abuse will not influence the outcome of the case. This could be justified where the judge sees the defendant behaving in a manner indicating his or her need

to maintain control over the victim, even in court. See Craft & Findlater, *The Dynamics of Domestic Violence*, 4 Colleague 1, 3 (Michigan Judicial Institute [hereinafter MJI], Dec. 1991). The court can also remind the defendant, as circumstances warrant, that:

- Domestic violence is a serious criminal offense.
- The charges are brought by the state or municipality, not by the alleged victim.
- Pretrial release conditions do not include the freedom to harm or intimidate the alleged victim, and such conduct may lead to the filing of additional criminal charges.
- Use of coercion or violence to affect the alleged victim's participation in the case will violate the release conditions.
- Violation of bond conditions will result in arrest, revocation or forfeiture of bond, and possible further prosecution for obstruction of justice or criminal contempt. See Section 9.6 on enforcing bond conditions.

9.2.2 Appointing Designees to Set Bond and Conditions of Release

Rules 5-401(K), 6-401(J), 7-401(J), and 8-401(H) authorize judges to designate, with certain exceptions, responsible persons to set bond and establish conditions of release. The judge should carefully weigh the risks presented by domestic violence cases when deciding whether to rely on such designees and when selecting the responsible persons to serve in that capacity. Those risks include the factors listed in Section 9.3 as warning signs of further abuse or even lethal violence. If the judge decides to delegate authority to set bond and conditions of release, such authority should be conferred upon a person who has been sufficiently trained and sensitized to the risks inherent in such cases. In particular, designees should be trained to consider factors that indicate the likelihood of recurring incidents of abuse if the accused is returned to the home without adequate analysis of risk factors and imposition of necessary safeguards.

9.2.3 Appointing Counsel for the Defendant

For a discussion of the judge's responsibility to offer the opportunity for the defendant to obtain counsel, limited jurisdiction judges may refer to the *New Mexico Magistrate and Metropolitan Court Benchbook* at Section 2.1-3(C) or the *Municipal Court Benchbook* at Section 3.7-6 through 8. The procedures set out in those sections protect defendants' right to counsel. Where indigent defendants are unable to retain their own counsel, courts should appoint counsel for them at the earliest opportunity. Expediting the appointment of counsel serves the dual purposes of protecting the defendant's rights while avoiding delays in the proceedings. In some domestic violence situations, long delays can result in further assaults on the victim, so courts should be especially conscious of avoiding unnecessary delay. Early appointment of counsel also protects the defendant's ability to prepare a defense. If the court appoints counsel prematurely, the defendant can later substitute counsel retained at his or her own expense in the court's discretion.

9.2.4 Required Written Statements by Judge

The Rules of Criminal Procedure require the judge to issue a written release order explaining the conditions of release. When the judge imposes special conditions on the pretrial release of the defendant in domestic violence cases, Rule 5-401(D) requires the judge to include all of the following in the written release order:

- A clear and specific statement of the specific conditions imposed.

- The consequences of violating a condition of release. The defendant must be informed *in writing* of the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release; the consequences for the violation, including immediate issuance of an arrest warrant by the court; and the consequences of intimidating any witness or otherwise obstructing justice.

- The circumstances that required the judge to impose the additional conditions of release that are designed to protect the alleged victim or any other conditions of release more restrictive than personal recognizance.

For all courts, completing and providing to the defendant Criminal Forms 9-302 or 9-303 partially fulfill this requirement, but the judge must be careful to find space on the form or an attachment to include the reasons for imposing conditions more restrictive than release on personal recognizance.

9.3 Factors to Consider in Determining Conditions of Release

Rule 5-401 states that the court may impose conditions on pretrial release to "reasonably assure the appearance of the person as required and the safety of any person and the community." In making its determination, Rule 5-401(B) requires the court to take into account the available information concerning all of the following factors:

- Nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug.
- Weight of the evidence against the person.
- History and characteristics of the person, including:
    - The person's character and physical and mental condition.
    - The person's family ties.
    - The person's employment status, employment history and financial resources.
    - The person's past and present residences.
    - The length of residence in the community.
    - Any facts tending to indicate that the person has strong ties to the community.
    - Any facts indicating the possibility that the person will commit new crimes if released.
    - The person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings.

    - Whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law.
- Nature and seriousness of the danger to any person or the community that would be posed by the person's release.
- Any other facts tending to indicate the person is likely to appear.

The court should attempt to ascertain immediately whether the defendant is already under a conditional pretrial release order or a protection order, or is on probation or parole for similar offenses in any jurisdiction. Since this would be incriminating information, the judge should not ask the defendant for this information unless the defendant has knowingly waived his/her rights against self-incrimination and to assistance of counsel. The history provided by such an inquiry could indicate whether the charge before the court might be part of a pattern of abusive conduct toward intimates. Such a pattern would suggest a continuing threat to the alleged victims, and should be carefully considered by the court when setting conditions of release. Of course, if an arrest occurs in apparent violation of an existing order, the court should take appropriate action in response to the violation as well.

As in any criminal case, the court's obligation in setting pretrial conditions of release in domestic violence cases is to strike an appropriate balance between two opposing interests: imposing adequate restraints both to assure the defendant's appearance and to protect others from harm, while inflicting the minimum necessary burdens on a person who has been charged with--but not convicted of--a crime. A sampling of research into the unique dynamics of domestic violence suggests that some of the assumptions the court might usually apply to this determination may operate differently in domestic violence cases.

For example, the prevalence of violence in family or household settings has been consistently high. The F.B.I reports that violence by an intimate – defined as a present or former spouse, boyfriend or girlfriend – accounts for over 800,000 violent crimes against women each year, about 21% of all violent crime experienced by women. Thirty percent of all female murder victims are killed by intimates each year, and women injured by intimates accounted for about 1 in 5 visits to hospital emergency departments for injuries arising from intentional violence. U. S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Factbook, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* (hereinafter cited as Bureau of Justice Factbook*)*, p. v, 45 (March 1998).

Of particular concern for courts setting conditions of release for alleged abusers is the statistic that nearly a third of female victims of nonlethal violence by intimates had been victimized at least twice during the previous six months. Bureau of Justice Factbook, p. 15. Consistent with that is the research finding that about half of all convicted inmates in local jails serving time for violence against an intimate had a history of having been placed under a restraining or protection order; nearly 40% of those sentenced were under a criminal justice status (such as a pretrial release order) or restraining order *at the time they committed their crime*. *Id.*, pp. 25-26. Moreover, three-quarters of the incidents of nonlethal intimate violence against women occur at or near the victim's home. Courts should also be aware that

slightly more than half of the female victims of violence by intimates live in households with children under age 12. *Id.* at p. 15.

Danger to a victim of domestic violence may increase at various times, sometimes predictably. One circumstance that increases the risk of escalation of violence is the point at which the victim decides to leave the relationship. Women are more likely to be victims of homicide when they are estranged from their husbands than when they live with their husbands. The risk of homicide is higher in the first two months after separation. Wilson, M., & Daly, M., *Spousal homicide risk and estrangement. Violence & Victims*, 8(1), 3-16 (1993). Domestic violence may often occur during periods of substance abuse: more than half of both prison and jail inmates convicted of a violent crime against an intimate were drinking or using drugs at the time of their offense. Bureau of Justice Factbook, p. 26. Acquisition or continued possession of weapons, particularly firearms, by alleged abusers during pretrial release is particularly risky, given that 29% of state prisoners who committed crimes against intimates were armed with a gun when they did. Bureau of Justice Factbook, p. 29.

Of course, these are only statistics and do not speak to the facts present in any particular case before the court. Each defendant is still entitled to a presumption of innocence until otherwise adjudicated, regardless of national statistics or the defendant's criminal record. In any individual case, the evidence at trial may show that the defendant is completely innocent, perhaps even was set up by an angry spouse, or may have acted in self-defense. Nevertheless, the foregoing national and state statistics indicate the importance, when setting conditions of release, of paying careful attention to the need to separate the parties, to restrain the defendant's conduct when risk factors of recurring violence are present, and to impose other conditions of release to protect the victim against recurring violence.

In a case with allegations of domestic violence, "the nature and seriousness of the danger to any person . . . that would be posed by the person's release," Rule 5-401(B)(4), may include circumstances indicating that the defendant is likely to kill the alleged victim. Assessing the lethality of a situation is difficult, because abusive relationships can be unpredictable. Lethal violence may occur unexpectedly, without any advance warning, or it may be preceded by one or more circumstances that serve as danger signals. In the latter case, researchers have found that certain factors can often reveal a potential for serious violence. These "lethality factors" are noted in the following list. While it is impossible to predict with certainty what a given individual will do, the presence of the following factors can signal the need for extra safety precautions — the more of these factors that are present in a situation, the greater its danger.

- The victim has left the abuser, or the abuser has discovered that the victim is planning to leave.

- The victim (who is familiar with the abuser's patterns of behavior) believes the abuser's threats may be lethal.

- The abuser threatens to kill the victim or other persons.

- The abuser threatens or attempts suicide.
- The abuser fantasizes about homicide or suicide.
- Weapons are present, and/or the abuser has a history of using weapons.
- The abuse involves strangling, choking, or biting the victim.
- The abuser has easy access to the victim or the victim's family.
- The couple has a history of prior calls to the police for help.
- The abuser exhibits stalking behavior.
- The abuser is jealous and possessive, or imagines the victim is having affairs with others.
- The abuser is preoccupied or obsessed with the victim.
- The abuser is isolated from others and the victim is central to the abuser's life.
- The abuser is assaultive during sex.
- The abuser makes threats to the victim's children.
- The abuser threatens to take the victim hostage or has a history of hostage-taking.
- The severity or frequency of violence has escalated.
- The abuser is depressed or paranoid.
- The abuser or victim has a psychiatric impairment.
- The abuser has experienced recent deaths or losses.
- The abuser was beaten as a child or witnessed domestic violence as a child.
- The abuser has killed or mutilated a pet or threatened to do so.
- The abuser has started taking more risks or is "breaking the rules" for using violence in the relationship (e.g., after years of abuse committed only in the privacy of the home, the abuser suddenly begins to behave abusively in public settings).
- The abuser has a history of assaultive behavior against others.

- The abuser has a history of defying court orders and the judicial system.
- The victim has begun a new relationship.
- The abuser has problems with drug or alcohol use or assaults the victim while intoxicated or high.

Walker, et al., *Domestic Violence and the Courtroom . . . Understanding the Problem, Knowing the Victim*, p. 4 (American Judges Foundation, 1995); Walker, The Battered Woman Syndrome, p. 38- 44 (Springer, 1984); Rygwelski, *Beyond He Said/ She Said,* p. 49-52 (Mich. Coalition Against Domestic Violence, 1995).

"The nature and seriousness of the danger to any person . . . that would be posed by the person's release" may also be indicated by the fears and observations expressed by the alleged victim or other knowledgeable people. Reports of an alleged abuser's threats, erratic behavior, or acquisition of weapons should be viewed with seriousness and even urgency, even if the suspect's behavior in court appears normal.

It is not uncommon, on the other hand, for an alleged victim of domestic violence to appear in court at the time of setting bond to request that the court refrain from issuing a "no contact" order or an order excluding the defendant from certain premises. Other alleged victims may request that the charges against the defendant be dropped. Some courts consider the wishes of the alleged victim in setting conditions of release. Other courts elect not to hear from the alleged victim, referring victim concerns with bond conditions to the prosecutor. The authors recommend the latter approach. The alleged victim is not a party to the criminal proceedings against the defendant, and the court can promote the victim's safety by emphasizing this fact to the defendant. A defendant who realizes that the victim cannot control court proceedings may be discouraged from making efforts to manipulate the victim's participation in the case. For more discussion of victim concerns with conditional release orders, see Section 9.5.2.

9.4 Contents of Conditional Release Orders

The court has broad authority to impose conditions of release under Rule 5-401 and the corresponding rules for limited jurisdiction courts. The following discussion summarizes the provisions of the rules governing the contents of conditional release orders, and addresses practical concerns with such orders in cases involving allegations of domestic violence.

9.4.1 Court Rule Requirements

Bail and conditions of release are granted in the district courts pursuant to Rule 5-401 and the corresponding rules for limited jurisdiction courts. Criminal Form 9-302 provides the official form in all courts for orders setting conditions of release and appearance bonds when the defendant is to be released on personal recognizance or an unsecured appearance bond. Where the defendant is released on a secured appearance bond or bail bond, Form 9-303 is used. These forms, when completed, contain the information required to be disclosed to the

defendant under Rule 5-403(D), provided that the judge inserts the explanation of the circumstances requiring imposition of the conditions of release other than personal recognizance.

Rule 5-401(C) further gives the court broad authority to impose any conditions or combination of conditions it determines are necessary to "reasonably assure the appearance of the person as required, and the safety of any other person and the community and the orderly administration of justice." Applying this standard, the court may order any of the following additional conditions in releasing the defendant:

- The condition that the person not commit a federal, state or local crime during the period of release.
- The least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:
    - A condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community.
    - A condition that the person maintain employment, or, if unemployed, actively seek employment.
    - A condition that the person maintain or commence an educational program.
    - A condition that the person abide by specified restrictions on personal associations, place of abode or travel.
    - A condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense.
    - A condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant.
    - A condition that the person comply with a specified curfew.
    - A condition that the person refrain from possessing a firearm, destructive device or other dangerous weapon.
    - A condition that the person refrain from any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner.
    - A condition that the person undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose.
    - A condition that the person submit to random urine analysis or alcohol testing upon request of a person designated by the court.
    - A condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes.
    - A condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

Note: Law enforcement officers in New Mexico have authority under §31-1-7 to arrest and take a suspect into custody when the officer is at the scene of a domestic disturbance and has probable cause to believe that the suspect committed an assault or a battery on a household member. It is not necessary that the officer witness the assault or battery under this section. The statute defines "household member" broadly for this purpose. Judges who include conditions of release that would be violated by an attack on a household member, such as those listed in Rule 5-401(C)(1) or (2)(e) or (m), should be aware that police will not require a warrant to take the defendant into custody if the requirements of §31-1-7 are present.

9.4.2 Promoting Pretrial Safety in Cases Involving Allegations of Domestic Violence

The following are suggestions on how judges can promote pretrial safety in cases involving allegations of domestic violence:

- **Emphasize that the criminal proceeding is between the defendant and the state, not the defendant and the alleged victim.**

  A court can promote the safety of the alleged victim by emphasizing to the defendant that the state has control over the prosecution of the case. Should the defendant be inclined to attempt to influence the victim to withdraw the prosecution, this explanation may discourage such efforts.

  Because the alleged victim is not a party to the criminal case, Rule 5-401 does not authorize the court to impose conditions on him or her. Accordingly, the court lacks authority to issue mutual "no contact" orders. Moreover, the court lacks authority to order that the alleged victim participate in counseling sessions, either alone or jointly with the defendant. The court may appropriately provide the alleged victim with information about community service providers, however, as long as it is clear that the use of such services is strictly voluntary. The court should be aware that joint counseling may endanger the victim in a violent relationship.

- **Consider issuing a "no contact" order that clearly prohibits *all* contact with the alleged victim.**

  The defendant in a domestic violence case often retains easy access to the alleged victim while the case is pending. If the defendant in fact turns out to have committed abuse, this conduct is often accompanied by the defendant's unusual concentration on the victim. The defendant may fear losing control over the victim or perceive threats lurking in ordinary conduct by the victim. Limiting the defendant's pretrial access to the alleged victim through "no contact" orders, which the court may issue pursuant to Rule 5-401(C)(2)(e), decreases the risk of coercion or re-assault. If the defendant and the alleged victim live together, the court has the option of issuing a "no contact" order that excludes the defendant from the shared premises. This can also expedite case processing by encouraging resolution of the case and discouraging efforts to delay the proceedings. Of course, if the defendant has the legal right to occupy the

premises through a lease or purchase and the defendant and victim are not married, the court cannot order the defendant removed (except possibly as a means of providing support for the defendant's child). If the defendant and alleged victim have children in common, the court can promote safe enforcement of its order by taking existing court orders regarding custody and parenting time into consideration. For more information on this subject, see Chapter 5.

Some courts consider the wishes of the alleged victim as a relevant factor in determining whether to issue a "no contact" order. Other courts have elected not to hear from the alleged victim in setting bond conditions and refer victim concerns to the prosecutor. Recent changes to the Victims of Crime Act give alleged victims the right to address the court regarding their rights under that Act at *any* scheduled court proceeding in a criminal case filed on or after July 1, 2005. H.B. 692, §1(A), 2005 Leg., Reg. Sess. (N.M. 2005). Presumably, this change gives alleged victims the right to address the court before trial about pretrial conditions because one of the victim's rights enumerated under the Act is the right to "be reasonably protected from the accused throughout the criminal justice process." §31-26-4(C).

Even where the alleged victim is allowed to speak, however, the court must emphasize to the accused that the alleged victim is not a party to the criminal proceedings and that the conditions imposed are imposed by the court. A defendant who realizes that the alleged victim cannot control court proceedings may be discouraged from attempting to obstruct justice in the case.

Effective "no contact" orders prohibit the defendant from making any contact with the alleged victim in person, by mail or e-mail, by phone, or through a third party. Because domestic violence can involve a repeated cycle of tension, abuse, and reconciliation, it may be helpful to remind the defendant and the alleged victim that *any* contact between them is a violation of a "no contact" order, even if the alleged victim initiates it or consents; the release conditions are a matter between the defendant and the court, not the defendant and the alleged victim.

- **If a "no contact" order is issued, the court should consider removing the defendant from shared premises.**

  If the defendant's residence with the alleged victim poses a safety threat, the court should consider removing the defendant from the shared premises and allowing the alleged victim and any children to remain. This is authorized under Rule 5-401(C)(2)(d). If the defendant has the right to occupy the premises through a lease or purchase and the defendant and victim are not married, the court cannot order the defendant removed (except possibly as a means of providing support for the defendant's child). If the court excludes a defendant from premises shared with the alleged victim, it can forestall some enforcement problems by including a provision in its order that specifies a date and time for removal of the defendant's property. The court might also provide for property removal under police supervision. Each such

determination should depend upon the circumstances presented by each case, but the court should seek thorough information on those circumstances.

- **Consider requesting a presence by law enforcement to allow the defendant to retrieve belongings.**

  If the defendant is ordered to leave the premises, he may experience heightened tension as he does so because he may feel that he is losing control over his spouse or partner. This tension may lead to further violence against the victim if the victim is unprotected at this sensitive time. The court may call upon a law enforcement presence to prevent such violence.

- **Remember that failure to support one's family members is a criminal offense.**

  Domestic abusers may exert control over their victims by manipulating the couple's finances. For example, an abuser may maintain the victim's dependence on the abusive relationship by limiting the victim's access to household money. It is thus not uncommon that an abuser who has been excluded from premises will assert control by refusing to make mortgage, utility, or other payments or to provide money for food or transportation necessary to support the victim and children who remain on the premises.

  Although questions of family support are typically addressed in domestic relations proceedings in family court, financial abuse is a criminal offense that can be as harmful as physical assault. New Mexico law makes the crime of "abandonment of a dependent" a fourth degree felony in §30-6-2. The statute provides:

  > "Abandonment of a dependent consists of a person having the ability and means to provide for his spouse or minor child's support and abandoning or failing to provide for the support of such dependent."

  If the court suspects that the defendant may exercise financial coercion against the victim by withholding essential support from the victim or her child, the court may impose additional conditions of release to prevent that from happening. Withholding financial support would be a violation of the state law forbidding abandonment of a dependent and therefore would violate the condition of release that the person not commit a state crime. Rule 5-401(C)(1). It could also be avoided by imposing the requirement that the person maintain or actively seek employment as an additional condition of release. Rule 5-401(C)(b).

- **Consider requiring the defendant to post bond.**

  The court should, in setting bond, make the determination stated in Rule 5-401(A): namely, whether release on personal recognizance or an unsecured appearance bond will reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community. If the court determines that the safety

of the victim or others will not be protected adequately by release on defendant's own recognizance or on an unsecured appearance bond, then the court should consider requiring the defendant to obtain a surety bond or deposit 100% in cash, as provided in Rule 5-401 A (1) – (3).

- **To protect the defendant's right against self-incrimination, do not order pretrial participation in a batterer intervention service.**

  Rule 5-401(C)(2)(j) allows the court to require the defendant to "undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose." Although batterer intervention services might be characterized as "psychological or psychiatric treatment," they are inappropriate pretrial treatment options because they typically require participants to admit responsibility for their violent acts. Prior to conviction, court-ordered participation in such a program would violate a criminal defendant's constitutionally guaranteed right against self-incrimination. After a defendant has been convicted or entered a plea of guilty or no contest, however, such programs may be valuable in appropriate circumstances.

  Batterer intervention programs should be distinguished from other types of "treatment programs" that promote safety without requiring participants to make incriminating admissions. A mental health assessment may be a necessary precaution in cases where the defendant is potentially suicidal or homicidal. The court may also order treatment for drug or alcohol use, which tends to increase the severity of domestic violence, but does not cause it. A release condition that addresses a mental illness (such as psychosis) is likewise justifiable on safety grounds, for such illnesses impede the defendant's ability to control his violent behavior.

  Batterer intervention services should also be distinguished from the pretrial informational programs that some courts have instituted for defendants in cases where domestic violence is alleged. These programs explain court proceedings and provide general information about domestic violence. Unlike batterer intervention services, however, they do not require participants to accept responsibility for specific behavior.

- **Use pretrial services when available to monitor bond conditions.**

  In courts with pretrial services programs, that office monitors defendants' compliance with bond conditions. Pretrial supervision may consist of drug and alcohol testing or "tether" programs. Some offices of pretrial services also assist the court by assessing the defendant's lethality or providing pretrial domestic violence education programs for defendants.

- **Inquire whether the defendant is subject to a protection order.**

  In issuing a conditional release order, the court might inquire whether another court has issued a protection order naming the defendant as the restrained party. Since this could be incriminating information, the judge should not ask the defendant for this information unless the defendant has knowingly waived his/her rights against self-incrimination and to assistance of counsel. If the court deems it necessary to impose release conditions that are inconsistent with the protection order provisions, it can prevent confusion by communicating with the court that issued the protection order.

- **Consider the need to preserve the confidentiality of information that identifies the victim.**

  In cases where the alleged victim is in hiding from the defendant, the court can promote safety by restricting the defendant's access to information that would identify the victim's whereabouts. For many felony cases, the Victims of Crime Act, §31-26-1, declares that the victim of the crime has the right "to be reasonably protected from the accused throughout the criminal justice process." §31-26-4(C). The defendant has the right to prepare a defense, and that will include the opportunity to identify the victim and obtain discovery through counsel in preparation for trial, including a statement from the accuser. So long as those rights are preserved, the court should consider whether the circumstances of the case justify the victim having her address, place of employment and telephone number withheld from disclosure during hearings or in any court files. Similarly, the court may consider withholding from the defendant other personal information that may place a victim in danger, including

  - A child's residence address.
  - A victim's job training address.
  - A victim's occupation.
  - Facts about a victim's receipt of public assistance.
  - A child's day-care or school address.
  - Addresses for a child's health care providers.
  - Telephone numbers for the above entities.

  Court records are not the only source of identifying information about crime victims. Victims can often be located by obtaining addresses from children's school, day care, medical, or dental records.

9.5 Modification of Conditional Release Orders

Because of the complexity and potential danger in criminal cases involving allegations of domestic violence, modification of conditional release orders should only be granted on the basis of objectively valid reasons. This section addresses requests for modification of a conditional release order in a domestic violence case by the defendant and by the alleged victim under the New Mexico Rules of Criminal Procedure. There are several ways in which a judge may modify the order setting conditions of release. Procedures available to limited jurisdiction judges are addressed in the *New Mexico Magistrate and Metropolitan Court Benchbook* at Section 2.8-1(D)(6), and the *Municipal Court Benchbook* at 3.3-7 and 8. Because these benchbook sections explain these procedures in general, and because reconsideration of the amount of bond is beyond the scope of this text, the discussion here is limited to special considerations relating to reconsideration of additional conditions of release in domestic violence cases.

9.5.1 Requests for Modification by the Defendant

Pending trial, a defendant may seek modification to the conditions of release to allow him to return home or have contact with the victim or their children. In such situations the court should inquire carefully into whether the defendant's overall conduct conforms to any expressions of remorse and of the defendant's stated desire to return to his/her family. If the court has found good cause to order the defendant out of the home in the first place, the defendant should be able to demonstrate why that cause no longer exists. It is possible for a defendant who returns to the home to change prior patterns of behavior that may have impelled the judge to issue a no-contact order, but it is also possible for those habits to reassert themselves, especially under the stress of pending criminal charges. When reconsidering conditions of release, the court can address this possibility by considering the lifting of only some conditions, while maintaining other constraints. These remaining constraints should be strong enough to signal to the defendant that the charges are serious and that any act of violence by the accused while on pretrial release will be dealt with decisively by the court.

9.5.2 Requests for Modification by the Alleged Victim

Sometimes the alleged victim appears in court to request modification of a pretrial release order. Common requests are that the court lift its "no contact" order, or allow the defendant to return to premises shared with the alleged victim. The alleged victim may also request that charges be dropped. The court should consider the circumstances that led to imposition of the restrictive conditions in the order in the first place, and confirm that the victim's request is not motivated by such inappropriate factors as:

- Coercion by the defendant.

- A cyclical pattern of tension building, abuse, and reconciliation in the relationship — the alleged victim may seek modification during a period of reconciliation.

- Ambivalence about jailing or otherwise removing the defendant from the home where the defendant is the sole source of support for the family.

- Emotional attachment to the defendant.

- Belief that the abuse will stop.

- Distrust of the legal process due to lack of information or prior bad experiences.

- Shame about the criminal proceedings or fear of public exposure.

Following are further observations about common scenarios that arise incident to requests for modification:

- The alleged victim's appearance in court with the defendant after issuance of a "no contact" order is itself a violation of that order, for which the defendant is subject to sanction. Such appearances may indicate that the defendant has used coercion to manipulate the victim's participation in the case.

- Appearances by one attorney who purports to act on behalf of both the defendant and the alleged victim may indicate coercion by the defendant, and are likely to involve a conflict of interest on the part of the attorney.

- If it modifies its release order, the court can promote safety by advising the defendant and the alleged victim that any deleted conditions can be reinstated if the court deems it necessary. If the court decides to drop a "no contact" provision, it might consider retaining a prohibition on assaultive behavior.

9.6 Enforcement Proceedings

A release order with conditions for the protection of a named person will only be effective if the defendant knows that violation of the order will result in sanctions. Lax enforcement of such orders may actually increase danger by providing the protected person with a false sense of security. Accordingly, strict, swift enforcement procedures are important tools to promote safety.

Procedures for issuing a bench warrant for the defendant's arrest, imposing additional conditions of release, forfeiting bond or otherwise enforcing the terms of the pretrial release order are discussed in the *New Mexico Magistrate and Metropolitan Court Benchbook* at Section 2.8-1(F), or the *Municipal Court Benchbook* at Section 3.3-9 and 14.

9.7 Denying Bond

The New Mexico Constitution guarantees a defendant's right to be released on bond pending trial. N.M. Constitution, Article II, §13. The court may only deny bail in non-capital cases

for up to sixty days after the defendant's incarceration, by an order entered within seven days of incarceration, and only in specified cases where the defendant, who is accused of a felony, has been previously convicted of felonies.

Specifically, if the defendant has been previously convicted of two or more felonies committed within New Mexico, neither of which arose from the same or a common transaction with the case for which the defendant is now before the court, the court may deny bail for sixty days. The constitution also allows denial of bail altogether for the sixty-day period if the defendant has been convicted of only one prior felony within the State, if the current charge involves a felony alleged to have been committed with a deadly weapon. The sixty-day limit may be extended to the extent that the trial has been delayed at the request of the defendant.

New Mexico law defines "felony" in §30-1-6(A) as follows:

> "A crime is a felony if it is so designated by law or if upon conviction thereof a sentence of death or of imprisonment for a term of one year or more is authorized."

"Deadly weapon" is defined in §30-1-12(B):

> "'deadly weapon' means any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives and all such weapons with which dangerous cuts can be given, or with which dangerous thrusts can be inflicted, including swordcanes, and any kind of sharp pointed canes, also slingshots, slung shots, bludgeons; or any other weapons with which dangerous wounds can be inflicted."

If the defendant does not have prior felony convictions such as those specified in this section of the Constitution, the court may not deny bond altogether for any period, but must set bond at a level that conforms to the requirements of the statutes and rules.

In cases where the defendant is alleged to have committed a capital offense, the Supreme Court has held that:

> "the charge of a capital offense raises a rebuttable presumption that the proof is evident and the presumption great that the defendant so charged committed the capital offense, and one so accused is not entitled to bail until that presumption is overcome . . . ."

Tijerina v. Baker, 78 N.M. 770, 773 (1968); *State v. David,* 102 N.M. 138, 143 (Ct. App. 1984). When resolving the issue of whether the defendant is entitled to bail, the defendant is entitled to due process of law, including notice and an opportunity to be heard, and to be represented by counsel. *State v. David,* 102 N.M. at 143-144. Strict rules of evidence do not apply at such hearings. Rule 5-401(M).

Even if bail may not be totally denied initially under Article II, §13, it may be revoked after notice and a hearing "when necessary to prevent interference with the administration of justice." *Tijerina v. Baker*, 78 N.M. at 773; *State v. David*, 102 N.M. at 142.

CHAPTER 10

EVIDENCE IN DOMESTIC VIOLENCE CASES

This chapter covers:

- Discovery.
- Jury selection issues.
- Victim/witness testimony.
- Expert testimony on the experience of battered women.
- Admissibility of character and conduct evidence.
- The hearsay rule, exceptions and related issues.

10.1 Overview

This chapter addresses evidentiary problems that are likely to arise in criminal cases involving allegations of domestic violence. Research overwhelmingly demonstrates that domestic violence victims are most vulnerable to an assault when they attempt to leave or sever the relationship with the defendant. Evidentiary issues arising in domestic violence cases are often complicated by the fact that the victim is particularly vulnerable at this stage, and thus may be reluctant to testify or may even refuse to do so. The victim often has learned that the perpetrator will follow through with threats of retaliation for the victim's efforts to leave or seek help from the justice system. The victim may also believe from experience that the intervention of the criminal justice system will not be effective in protecting the victim, the children, or the victim's family.

Victims of all types of violent crime may be reluctant to testify against the assailant due to a number of factors. These can include fear of retaliation by the defendant; unwillingness to face the assailant again in the courtroom; a feeling of shame or guilt; belief their behavior in some way caused the attack; and a desire to put the whole incident behind them. Of course, as with any crime, victims also may make accusations they cannot later support under oath. A domestic violence victim's reluctance to testify may be heightened by the fact that defendant may be living with the victim, be familiar with his/her daily routine, and have ongoing access to the victim. In addition, the victim and the defendant may have children together. Since domestic violence may not always be considered by civil courts in determining child visitation and custody, the perpetrator may have continued access to the

victim through arrangements for child visitation.

It is important for those working in the criminal justice system to distinguish between victims who are reluctant to testify and those who refuse to testify. Many victims who are initially reluctant to testify will agree to do so if provided with adequate support during the criminal justice process. The court must always remain impartial and must not attempt to coax testimony from a witness who does not wish to provide testimony. On the other hand, when the court has reason to believe that the witness' reluctance to testify arises from fear or coercion, the court may act to protect the administration of justice against improper influences. In those circumstances, the court can decrease the victim's reluctance to testify by protecting the victim through appropriate court orders, providing the victim with support through victim advocacy services, providing accurate information regarding the criminal court process, and otherwise preventing the perpetrator from using further illegal means to continue the pattern of coercive control of the victim. These kinds of protection are authorized under the Victims of Crime Act, §31-26-1 et seq.

10.2 Discovery

10.2.1 Victim/Counselor Privilege

A victim's communications with a domestic violence counselor are generally not subject to discovery or subpoena without permission of the victim. Under the Victim Counselor Confidentiality Act, §31-25-1 et seq., neither a victim nor a victim counselor can be compelled to:

- Provide testimony or produce records concerning confidential communications for any purpose in any criminal action or other judicial, legislative or administrative proceeding.
- Provide testimony in any civil or criminal proceeding that would identify the name, address, location or telephone number of a safe house, abuse shelter or other facility that provided temporary emergency shelter to the victim of the offense or occurrence that is the subject of a judicial, legislative or administrative proceeding unless the facility is a party to the proceeding.

§31-25-3.

The Act's definitions' section, §31-25-2, includes the following:

- "Confidential communication" means any information exchanged between a victim and a victim counselor in private or in the presence of a third party that is necessary to facilitate communication or further the counseling process, which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault or family violence.
- "Victim" means a person who consults a victim counselor for assistance in

overcoming adverse emotional or psychological effects of a sexual assault or family violence.

- "Victim counselor" means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims, who is not affiliated with a law enforcement agency or the office of a district attorney, has successfully completed forty hours of academic or other formal victim counseling training or has had a minimum of one year of experience in providing victim counseling and whose duties include victim counseling.
- "Victim counseling" means assessment, diagnosis and treatment to alleviate the adverse emotional or psychological impact of a sexual assault or family violence on the victim. Victim counseling includes crisis intervention.

A victim does not waive the Act's protections by testifying in court about the crime. If the victim partially discloses the contents of a confidential communication while testifying, either party may request the court to rule that justice requires waiver of the privilege. Any waiver must apply only to the extent necessary to require a witness to respond to questions concerning the confidential communication that are relevant to the facts and circumstances of the case. §31-25-4(A). A victim counselor does not have authority to waive the privilege. §31-25-4(B).

10.2.2 Victim's Location

In New Mexico, the address of a victim of domestic violence is not protected by statute. The court, however, may wish to keep the victim's address or phone number from the defendant, particularly in those cases where the victim has moved to a shelter or some other location unknown to the defendant. Section 31-25-3(B) prohibits compelled disclosure by the victim or the victim's counselor of the address of a safe house, an abuse shelter, or an emergency facility providing temporary shelter. Where appropriate, special arrangements may be necessary to protect the defendant's right to discovery from the alleged victim without revealing a home address.

10.3 Jury Selection Issues

Judges should be attentive to biases among prospective jurors when considering challenges for cause.

Potential jurors—male and female—may hold "traditional" or religious-based attitudes regarding domestic violence that render them unable to hear cases fairly and impartially. They may see criminal justice intervention as an invasion of the family's privacy, interference in the spousal relationship, and/or violative of the male's historical sense of "entitlement" to control the household and its members. While they have an unquestioned right to hold such beliefs personally, such beliefs may still render them unqualified to serve as impartial jurors in such cases. Conversely, a person who has been or is close to a victim of domestic violence, particularly recently, may feel too close to the alleged victim of the

defendant to exercise the role of a juror impartially.

Voir dire examination by parties in domestic violence cases should identify these individuals whose beliefs may cause them to experience difficulty in weighing evidence impartially, and in determining witness credibility in these cases. It may be advisable to instruct prospective jurors that portions of the voir dire examination can be conducted in chambers, so that jurors feel free to reveal potentially embarrassing or upsetting information. The defendant, his or her counsel, and the prosecutor should be present during the *in camera* proceeding.

To identify biased jurors who may be subject to challenge for cause, judges should be particularly attentive to prospective jurors' answers to questions concerning such issues as:

- Whether the juror sees domestic violence as an appropriate matter for the courts or otherwise less serious than other violent crimes.

- Whether the juror has been or knows a victim of domestic violence, and if so, whether that case was prosecuted.

- The prospective juror's attitudes toward the obligations of the parties to a marriage, including such issues as whether a husband has a right to punish his wife or respond with violence to "provocations."

- If the case involves domestic violence between non-traditional intimate partners, such as gay or lesbian partners, the prospective jurors' personal attitudes or religious beliefs concerning such relationships and the potential for those beliefs to interfere with a fair application of the law to the facts.

10.4 Victim/Witness Testimony

10.4.1 Reasons Underlying Victim Reluctance or Refusal to Testify

Victims of domestic violence are often reluctant to testify for the same reasons that victims of all types of violent crime are reluctant. These include:

- A fear of retaliation by the defendant. A study of victims of violent crime (including but not limited to domestic violence) found that 57% feared reprisal from the defendant. Violent crime victims who were threatened by the defendant were twice as likely not to follow through with the prosecution than victims who were not threatened. Davis R., Smith, B., & Henley S., *Victim/Witness Intimidation in the Bronx Courts,* Victim Services Agency, N.Y. 1990.

- An unwillingness to face the assailant again in the courtroom.

- Fear of economic loss or emotional abandonment if the defendant is jailed or removed from the household.

- A feeling of shame or guilt that perhaps their behavior in some way caused the attack.

- Desire to put the whole incident behind them and hope that the incident of violence is over.

- Denial, ambivalence, withdrawal, and emotional swings which are result of being a victim of severe trauma.

The reluctance of a victim to testify should not be assumed, however, to derive from the defendant's guilt of the charges against him.

While the victim's reluctance to testify may result from the defendant's conduct or implicit threats, the defendant is still entitled to a presumption of innocence of any criminal charges, and the burden still lies with the petitioner to prove her entitlement to any civil relief such as an order of protection. It is possible for a witness to be reluctant to testify against the alleged abuser for any number of reasons, including the possible falsity of the original charge or claim. The court should not deduce the defendant's guilt or liability from the complaining witness' or petitioner's reluctance or refusal to testify. But the court may consider that reluctance or refusal as a possible indicator of interference with the judicial process, possibly by the defendant or others acting on his behalf. This is particularly true when independent evidence shows that the victim was in fact injured and cannot provide a satisfactory alternative explanation for the injuries. In such situations, the court may take steps to protect the judicial process and ensure that justice is done.

Reluctance or refusal to testify due to fear, embarrassment or denial is often heightened for victims of domestic violence by the following common circumstances:

- The defendant may be living with the victim, be familiar with her/his daily routine, and have ongoing access to the victim.

- The victim's past efforts to leave the perpetrator or to seek protection from the justice system may have resulted in further violence. The victim has learned that the perpetrator will follow through with threats of retaliation for the victim's efforts to leave or to seek help from the justice system.

10 The perpetrator may be maintaining coercive control over the victim through alternating displays of affection and threats or acts of violence if the victim testifies.

11 The defendant may be using homophobia to control the victim, by threatening to "out" the gay or lesbian victim or by implying that the gay or lesbian victim will not receive any help because of his or her sexual orientation. Finley Duthu, Kathleen, *Why Doesn't Anyone Talk About Gay and Lesbian Domestic Violence?,* 18 Thomas Jefferson L. Rev. 23-40 (1996) (quoted in Lemon, Domestic Violence Law 196-97 (2001)).

12 The victim and defendant may have children together. Since domestic violence is often not considered by civil courts in determining child visitation and custody, the perpetrator may have continuing access to the victim through arrangements for child visitation.

- The victim and/or children may be dependent on the defendant for economic support. Thus, the victim may have conflicting feelings about the possibility that criminal justice intervention may result in incarceration of the defendant and the loss of support.

- The defendant may be dependent on the victim for economic support, thus increasing the likelihood of further acts of intimidation by the defendant.

- The victim's community and family, who have provided protection from the abuse in the past, may be threatening to withdraw their support and protection if the victim testifies.

- The victim may believe that the intervention of the criminal justice system will not be effective in stopping the violence or in protecting the victim and children. This belief may be a result of experience where the system did indeed fail to prevent the violence, and/or it may be based on the perpetrator's ability to convince the victim that nothing will stop him.

It is important to distinguish between victims who are reluctant to testify and those who refuse to testify.

The majority of victims who are initially reluctant to testify will do so if provided with adequate support during the criminal justice process. The judge may not step into the role of prosecutor and attempt to coax the witness into testifying. The court can, however, decrease the victim's reluctance to testify and protect the administration of justice against improper influences by providing the victim with support through victim advocacy services, providing accurate information regarding the criminal court process, protecting the victim through appropriate court orders, and preventing the perpetrator from using further illegal means to continue the coercive control of the victim. What appears to be victim reluctance to testify is more often an indicator of the perpetrator's continuing use of coercive control over the victim than of the victim's inability to follow through with the case. Such forms of protection are authorized under the Victims of Crime Act, §31-26-1 et seq.

10.4.2 Victim Reluctance or Refusal to Testify: Options for the Court

Require a victim's presence in court by issuing a subpoena or ordering a victim already in court to return on another date.

Many victims will testify once ordered to do so by the court. Many feel considerable relief at

being able to tell the defendant that the decision to testify is out of their hands because they have been ordered to do so by the court. Even victims who are willing to testify should be ordered by the court to do so. This reinforces to the defendant that the court, not the victim, controls the proceedings, and that any attempt to manipulate or intimidate the victim in an effort to avoid criminal prosecution will be unavailing.

In extreme circumstances, such as when great bodily harm to the victim appears likely if the case does not proceed, a district court may even exercise its authority to call the victim as the court's witness. Rule 11-614.

If the victim appears reluctant to testify, it may be possible to ascertain the reasons underlying the reluctance.

A prosecutor may inquire into the witness' reluctance to testify. The court can ascertain from the victim's answers whether the witness has of her own free will decided not to give evidence, or whether misconduct by the accused or respondent is in fact preventing the testimony. Lines of inquiry that the prosecutor might pursue in this regard could include questions about the alleged abuser's access to the victim or her children or other family members, the victim's financial dependency on the accused abuser, promises or threats made by the accused if the victim gives evidence in the case, and whether the victim would accept the court's offer of protection if she were to provide testimony proving that she is in danger from the accused. Impartiality of the judiciary does not mean that the court must stand silent while the administration of justice is being thwarted by improper influences.

If the victim remains reluctant to testify, the court may want to consider continuing the case for a period of hours to permit the victim to obtain information and options/counseling from the victim/witness program or local domestic violence program.

Victim advocates can give accurate information regarding the court process and can assist the victim in setting up a safety plan. This will often remedy reluctance which stems from fear of the defendant, belief that there is no alternative but to return home, or inaccurate information regarding possible outcomes of the criminal court process.

Referring a reluctant victim/witnesses to a victim advocate plays a critical role in reducing victim reluctance, and thus reduces the perpetrator's ability to control the victim. Jurisdictions that provide victim advocacy services to domestic violence victims report a dramatic decrease in victim reluctance to testify. In San Francisco, 70% of domestic violence victims who were initially reluctant to proceed with a criminal complaint subsequently became willing to testify after they had spoken with a victim advocate. (Family Violence Project, 1982).

"In several courts, judges report that battered women are more willing to cooperate and testify when they receive information, emotional support, community referrals, and trial preparation from victim advocates . . . ." (See Goolkasian G.A. *Confronting Domestic Violence: The Role of Criminal Court Judges,* NIJ: Research in Brief U.S., Department of

Justice, 1986).

Presence of Victim Support Persons in Court

Where the jurisdiction offers a domestic violence victim's advocate program, the victim advocate may accompany the victim to court. Courts should familiarize themselves with the services of victim advocates in their jurisdiction so that those advocates can provide appropriate support for judicial proceedings.

Where prosecutors are not present at hearings, the burden of proof will be on the victim and/or the arresting officer. To facilitate the court's fact finding, the following procedures may be helpful:

The court may want to establish procedures for apprising the victim prior to the hearing of the elements of the crimes charged so that the victim can specifically address those elements.

When the victim does not provide a clear chronological rendition of the events that occurred, the court may exercise its authority to ask questions in a manner that gives the victim the time and latitude needed to describe the incidents constituting the alleged crime. In doing so, however, the court must be careful to avoid becoming an advocate for either party.

10.4.3 Testimonial Privileges

Generally, marital privileges are inapplicable to situations where the defendant/spouse has allegedly committed a crime against the victim/spouse. See, e.g., §38-6-6; Rule11-505.

10.4.4 Child Testimony in Domestic Violence Cases

See also Chapter 27: Evidence, New Mexico Child Welfare Handbook: A Legal Manual on Child Abuse and Neglect, Institute of Public Law 2000, http://jec.unm.edu/ (Benchbooks).

Assessing whether to allow children's testimony in a domestic violence case

The decision whether to allow children's testimony in domestic violence cases raises several issues. On the one hand, children often are present during the violence, so their testimony may have great probative value. On the other, a child may suffer serious emotional trauma from testifying. Children may be under great pressure from one or both parents to testify or not to testify. They may fear physical retribution by the violent parent if they testify, as well as fear abandonment from the victim parent if they do not testify. They may feel a sense of loyalty to both parents and may not want to be forced to "take sides."

The decision to present children's testimony in these cases should be made with great care and only after the court has conducted an assessment of the danger to the child if she/he testifies. The court should ensure that appropriate protections are provided for children that testify and that services are available to help them cope with the potential emotional trauma.

Determining a child's competency.

Rule 11-601 of the New Mexico Rules of Evidence states that "Every person is competent to be a witness except as otherwise provided in these rules."

Children have been accepted as competent witnesses in New Mexico courts for more than 100 years. In *Territory v. DeGutman*, 8 N.M. 92, 42 P. 68 (1895), the court first considered child competency when a ten-year-old child was declared competent to testify. The trial court should inquire into the "degree of understanding possessed [by the child], and if it then appears that the child has sufficient natural intelligence, and understands the nature and effect of an oath, he [should] be permitted to testify, whatever his age may be."

The rule remains as stated by the *DeGutman* court. For any witness to be deemed competent to testify, the witness must have each of the following:

- Capacity to observe;
- Sufficient intelligence;
- Adequate memory;
- Ability to communicate;
- Awareness of the difference between the truth and a lie; and
- Appreciation of the obligation to tell the truth in court.

No modern rule defines any particular age as conclusive of competency. See Wigmore, *Evidence in Trials at Common Law*, 505. In *State v. Hunsaker*, 693 P.2d 724 (Wash. 1984), a 3-year old child was found competent to testify about what had happened to her when she was age 2. See also:

1. *State v. Manlove*, 79 N.M. 189 (Ct. App. 1968). A 6-year old female victim of sexual assault was permitted to testify. The court stated there is no rule of law setting a birth date for presumed competency and the burden of showing incompetency is on the party asserting it. The court held that "the trial court must determine from inquiries the child's capacities of observation, recollection and communication, and also the child's appreciation or consciousness of a duty to speak the truth."

2. *State v. Ybarra*, 24 N.M. 413 (1918). A child of "tender years" was permitted to testify in a murder case. The court held that although the child stated that he did not understand the nature of an oath, that "is not of itself sufficient ground for his exclusion as a witness, where it clearly appears that the child has sufficient intelligence to understand the nature of an oath and to narrate the facts accurately, and knows that it is wrong to tell an untruth and right to tell the truth, and that if he told an untruth he would be punished, and, from other facts, that he is competent."

3. *State v. Fairweather*, 116 N.M. 456 (1993). "A child witness, or any competent

> witness for that matter, need not know the consequences of perjurious testimony, or even what the term 'perjury' means; he or she need only know that lying is wrong." Thus even though there may be inconsistencies in a child's account, this does not mean that the child is incompetent to testify.

At any proceeding with a child witness, the trial judge must decide whether the witness is competent to testify. Starting with the threshold assumption that any witness is competent unless shown otherwise, it has been unclear what methods and procedures the court should use for determining testimonial competency when a minor witness's ability is questioned. Some basic rules, however, are applicable to this determination. When competence of a witness to testify is raised before the court, the judge should make a competency determination. That determination may be made by a voir dire examination of a child or, if raised prior to the child's testimony, may be made based on prior statements made by the child (e.g. review of a safehouse interview). The court may also rely upon extrinsic evidence such as testimony or reports from doctors, psychologists, therapists, evaluators, etc., if determined necessary. See §§14.2.3 and 2 Wigmore 485. The party challenging the child witness's competency has the burden of proof. *State v. Manlove*, 79 N.M. 189 (Ct. App. 1968). The rules of evidence do not apply to the court's inquiry. The court has broad discretion to admit or exclude the testimony of a child witness and reversal is only appropriate upon a showing of abuse of discretion. *State v. Macias*, 110 N.M. 246 (Ct. App. 1990).

Decisions from other jurisdictions offer additional guidance on the procedures for examining child witnesses. The examination format should be governed by the needs of the child and lies within the discretion of the trial judge. *People v. District Court*, 776 P.2d 1083 (Colo. 1989). During the competency evaluation, the court typically does not discuss with the child the facts of the case. *State v. Scott*, 501 N.W. 2d 608 (Minn. 1993); *People v. Trujillo*, 923 P.2d 277 (Colo. 1996). The accused need not be present during this *voir dire* of the child witness. *Kentucky v. Stincer*, 482 U.S. 730 (1987); see also 18 U.S.C. 3509(c)(5). Courts have been permitted to conduct *voir dire* of the child with or without the participation of counsel during or before trial. The judge may choose a setting other than the courtroom (such as chambers) for the competency evaluation. Leading questions are not prohibited in the court's evaluation hearing. *Burkett v. State*, 439 So.2d 737 (Ala. 1983).

Court orders to protect child from influence.

A court can order no contact with the child by anyone deemed to be influential on the child's testimony. Furthermore, if the court does not deny contact, it can order the "influencer" not to discuss the case with the child witness. Pursuant to N.M. Rule of Criminal Procedure 5-507, a motion for protective order can be filed with a showing of good cause to protect the child from "the risk of physical harm, intimidation, [and] bribery . . . ." Certainly an inquiry can be made of a child to determine if a party has attempted to influence the child's testimony.

Alternative methods of evidence taking.

In *Maryland v. Craig*, 110 S. Ct. 3157, 3169 (1990), the United States Supreme Court held that the confrontation clause of the federal constitution does not guarantee criminal defendants an absolute right to a face-to-face meeting with the witness. In *Craig*, the defendant was completely deprived of his right to face-to-face confrontation with the child witness as the child testified via television monitor out of the presence of the defendant. The court announced that prior to the admission of such testimony, the trial court must find "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant."

While there is a specific provision in New Mexico law which allows for a video taped deposition of a child's testimony, the application of that provision is restricted to testimony by children under the age of 16 who are victims of criminal sexual penetration or contact. See §30-9-17 as amended and Rule 5-504 of the Rules of Criminal Procedure.

Case law has supported the use of video taped depositions under certain conditions:

1. *State v. Vigil*, 103 N.M. 583 (Ct. App. 1985). Use of videotaped deposition did not deny the defendant the right of confrontation.

2. *State v. Tafoya*, 108 N.M. 1 (Ct. App. 1988). Videotaped depositions of victims while defendant was required to remain in a control room instead of the room in which the testimony given was not a violation of confrontation clause and was consistent with §30-9-17.

However, in *State v. Benny E.*, 110 N.M. 237 (Ct. App. 1990), the child defendant's confrontation rights were violated where the alleged child victim was permitted to testify at trial in the judge's chambers with only counsel and the judge present and the accused child watched on a video monitor located in another room. This procedure was invalid because the court failed to enter particularized findings of special harm to the victim that were supported by substantial evidence.

Other discretionary judicial acts that may contribute to the comfort, support and protection of child witnesses.

New Mexico Rule of Evidence 11-611(C): "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions." The Advisory Committee's Note to F.R.E. 611(c), which is comparable to New Mexico's Rule of Evidence states:

> The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems . . . . The matter clearly falls within the area of control by the judge over the mode and

> order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

56 F.R.D. 183, 275.

New Mexico courts have held that leading questions are often permissible when a witness is immature, timid or frightened, although the words of a prosecutor cannot be substituted for the testimony of the witness. *State v. Orona*, 92 N.M. 450 (1979). In a child sexual abuse case, where the court drew a stick figure to help the victim testify, the drawing was relevant, and the court's leading questions to the victim tended to clarify the evidence. *State v. Benny E.*, 110 N.M. 237 (Ct. App. 1990).

State v. Marquez, 124 N.M. 409 (App. 1998) discussed the use of "comfort items" during child testimony. In *Marquez*, the child held a teddy bear while testifying. The court recognized that there is no specific rule that addresses this area and recognized the needs in presenting evidence. "[T]rial courts are allowed latitude in exercising reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, . . . and (3) protect witnesses from harassment or undue embarrassment." *Id.* at ¶ 5 (internal quotations and citations omitted). The court's procedures will be reviewed for an abuse of discretion. The court balances the prejudicial effect of the "comfort item" against the necessity of the "comfort item" and its effect in calming the child.

Assessing the credibility of victim's and/or children's testimony

Expert testimony is not admissible as to credibility. See *State v. Alberico*, 116 N.M. 156 (1993). Whether or not the witness is being truthful is for the factfinder to decide.

10.5 Expert Testimony

For more information, please refer to the Judicial Education Center's website: http://jec.unm.edu/, where we have included an interactive chart on expert testimony in domestic violence cases in Module 5 of the Domestic Violence Web Course.

10.5.1 Expert Testimony on the Experience of Battered Women

Trial attorneys may sometimes offer testimony concerning the experience of battered women for the purpose of establishing one of the following:

1. The specific effects of abuse on battered women;
2. That a particular victim is indeed a battered woman; or
3. That a particular victim suffers from the collection of specific effects of abuse on battered women collectively known as the "battered women's syndrome."

For further discussion, see Douglas, M.A., *The Battered Woman Syndrome*, in Sonkin, D.,

ed., Domestic Violence On Trial, Springer, New York, 1986; see also 18 ALR 4th 1153 *Admissibility of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome.*

While such testimony may focus on the victim's behavior, e.g. recanting testimony, minimizing and denying, etc., it is also important for the court and trier of fact to understand the context in which the violence has occurred.

The court should examine the perpetrator's patterns of violence and control of the victim, the perpetrator's belief systems that support the violence, the impact of the violence and abuse on the victim, how the victim has attempted to protect herself and the children from the violence in the past, the reasons the victim stayed in the relationship or returned to it, and the reasonableness of the victim's belief or apprehension that the perpetrator is going to inflict serious bodily harm or death. It is important that the court view the victim's behavior within the context of the impact of the violence on the victim.

For admissibility of expert testimony on battering and its effects in cases where the alleged battered woman is the victim/defendant:

When offered by the prosecution, see, e.g.,, *State v. Ciskie*, 751 P.2d. 1165 (Wa. 1988);

When offered by the defense, see, e.g., *State v. Gallegos*, 104 N.M. 247 (Ct. App. 1986); *State v. Swavola*, 114 N.M. 472 (Ct. App. 1992); *State v. Vigil*, 110 N.M. 254 (S. Ct. 1990).

10.5.2 Expert Testimony on Culture

In addition to expert testimony on battering and its effects, parties in a domestic violence case may offer testimony on the victim's or the perpetrator's culture. For purposes of this discussion, "[c]ulture means the shared experiences or other commonalities of groups of individuals based on factors of identification that have developed in relation to changing social and political contexts, such as race, ethnicity, gender, sexuality, class, disability status, religion, age, military experience, immigration status, nationality, regionality, and language. Culture is multifaceted, often changing, . . . incorporates contradictory elements [and is] based on a person's unique set of experiences." Ramos, Cultural Considerations §1.7 at 1-5.

Cultural evidence may be used to explain the victim's conduct because "'battering and its effects are experienced differently by different [victims]. For example, a poor Hispanic immigrant woman, a highly educated African-American woman, and elderly white lesbian, and a teenage welfare mother face very different obstacles in dealing with domestic violence.'" *Id.* §2.19 at 2-17 (quoting the National Association of Women Judges, *Expert Testimony in Criminal Cases Involving Battered Women*). In addition, culture may also be used to discredit the victim's testimony, to demonstrate that the defendant did not have the required mental state, to excuse or mitigate guilt at sentencing, or to establish that the defendant's actions were reasonable. *Id.* §2.5 at 2-3.

Although cultural information may be invaluable, it is easily (if inadvertently) misused.

Courts must be careful not to fall back on cultural stereotypes and generalizations that do not accurately reflect a particular defendant or victim when admitting cultural evidence or when qualifying an expert witness. When deciding whether to admit expert testimony on culture, the court must first determine that all admissibility requirements are satisfied: the evidence must be relevant, its prejudicial effect must not substantially outweigh its probative value, and it must not confuse the issues or mislead the factfinder. N.M. Rules of Evidence 11-402 and 11-403. In addition, the court must be convinced that the witness qualifies as an expert on the relevant culture. The expert witness should be able to offer "cultural information that informs the factfinder about this individual defendant's [or victim's] cultural experience and [that] provides the context within which the factfinder decides the ultimate issue." *Id.* §2.18 at 2-15 and 2-16. To ensure that the witness is able to do so, the court should "inquire about the following from a proposed expert (using the example of a [victim or defendant] of Chinese background):" whether "the expert has worked with American-born persons of Chinese ancestry, Chinese immigrants, or first generation Chinese-Americans;" whether the expert has worked with age groups similar to that of the defendant or victim; whether the expert speaks the same language or dialect as the defendant or victim; whether and when the expert has studied or visited in the victim or defendant's province in China; and whether the expert has any specific information "about the culture of the individual in court," as identified by that individual. *Id.* §2.14 at 2-10.

The following cases demonstrate how culture has been used and misused in domestic violence cases:

For cultural evidence to explain why the victim recanted, see *Basu v. Georgia*, 492 S.E.2d 329 (Ga. Ct. App. 1997). In *Basu*, the victim testified "that in her culture, if a husband instructed his wife to deny to non-family members that he hit her, the wife would have to obey." The judge relied on this cultural information to assess the credibility of the victim's recantation and the reliability of her earlier, out-of-court statements inculpating her spouse. Ramos, Cultural Considerations §2.34 at 2-42.

For cultural evidence used to discredit the victim witness, see, e.g., *State v. Lee*, 494 N.W.2d 475 (Minn. 1992) (a defense expert attempted to show that the defendant's wife was lying because she did not react the way a Hmong woman would have reacted to being raped by her spouse, that is, she would not have waited a few days to report the rape as this victim did).

For cultural evidence offered to negate criminal intent, see, e.g., Ramos, Cultural Considerations §2.26 at 2-29 and 2-30, discussing two unpublished cases. In the first, a Jamaican defendant claimed that he did not have the criminal intent to kill his wife because he was acting in accordance with Jamaican witchcraft, which was considered rational in Jamaica. Although the court found the defendant guilty, it used the cultural evidence to reduce the defendant's sentence on the grounds that the defendant's delusional beliefs diminished his criminal intent. In the second case, the Ethiopian defendant shot a woman he dated because "he believed she was a 'bouda,' a woman through whom an Evil Spirit inflicts pain." *Id.* The court admitted expert testimony concerning the Ethiopian belief in boudas because it might explain the defendant's state of mind. The defendant intended the cultural information to show that he behaved rationally under his cultural norms. But, as the author

points out, "beliefs that are rational in a defendant's culture do not necessarily negate the formation of *mens rea*. In fact, they might strengthen the argument that the defendant was very clear about his intent. A belief that someone is a bouda does not mean that bouda has to be shot." *Id.*

For cultural evidence offered to excuse or mitigate culpability, see, e.g., *People v. Natale*, 199 Cal. App.2d 153 (1962) (refusing provocation defense based on Italian American standard in a case where the defendant murdered his wife and daughter); *State v. Girmay*, 652 A.2d 150 (N.H. 1994) (excluding evidence of defendant's life in war-torn Ethiopia and of Ethiopian social customs in trial for murder because irrelevant to prove the defendant's mental state).

10.6 Admissibility of Character and Conduct Evidence

Generally, the existence of similar acts of conduct is admissible to show intent, identity, lack of accident, motive, knowledge, plan or preparation, or good faith belief in consent. See, e.g., New Mexico Rules of Evidence 11-404(b); *State v. Jones*, 120 N.M. 185 (Ct. App. 1995); *State v. Peters*, 123 N. M. 446 (S. Ct. 1997).

The court must weigh the probative value of the evidence against the danger of undue prejudice in deciding admissibility. See, e.g., New Mexico Rules of Evidence 11-403; *State v. Woodward*, 121 N.M. 1 (S. Ct. 1995); *State v. Jones*, 120 N.M. 185 (Ct. App.1995).

For prior or subsequent bad acts toward the same victim, see *State v. Woodward*, 121 N.M. 1 (1995). Such evidence has been allowed as proof of defendant's:

1. Mental element or intent.

See, e.g., *U.S. v. Joe*, 8 F.3d. 1488 (10th Cir. 1993); *U.S. v. Russell*, 971 F.2d 1098 (9th Cir. 1992); *Virgin Islands v. Harris*, 938 F.2d 401 (3rd Cir. 1991); *People v. Zack*, 184 Cal. App. 3d 409, 229 Cal. Rptr. 317(Ca. 1986).

2. Motive, to rebut accident or self-defense.

See, e.g., *People v. Zack*, 184 Cal. App. 3d 409, 229 Cal. Rptr. 317 (Ca. 1986); *People v. Daniels*, 16 Cal. App. 3d 36, 93 Cal. Rptr. 628 (1971).

3. Identity.

See, e.g., *State v. Woodward*, 121 N.M. 1 (1995), *People v. Zack*, (Ca. 1986) 184 Cal. App. 3d 409, 229 Cal. Rptr. 317; *People v. Daniels*, 16 Cal. App. 3d 36, 93 Cal. Rptr. 628 (1971).

4. Continuous course of conduct.

See, e.g., *U.S. v. Hinton*, 31 F.3d 817 (9th Cir. 1994).

Evidence of defendant's prior or subsequent bad acts toward a different victim has been admitted:

5. To prove motive to rebut defenses of accident or heat of passion.
See, e.g., *People v. Bufarole,* 193 Cal. App.2d. 551 (Ca. 1961).

6. To prove an element of the act or behavior pattern to show identity.
See, e.g., *State v. Peters,* 123 N. M. 446 (1997); *People v. Archard,* 477 P.2d. 421 (Ca. 1970).

7. To support or attack the credibility of a witness.
See, e.g., 2 Jefferson, California Evidence Benchguide at 1213.

8. To establish intent.
See, e.g., *State v. Falby,* 444 A.2d 213 (Conn. 1982).

For admissibility into evidence of prior acts of violence by a domestic violence defendant, see *State v. Woodward,* 121 N.M. 1 (1995); *State v. Hernandez,* 115 N.M. 6 (1993); *State v. Niewiadowski,* 120 N. M. 361 (Ct. App. 1995)*; State v. Swavola,* 114 N.M. 472 (Ct. App. 1992); *State v. Gattis,* 105 N.M. 194 (Ct. App. 1986); *U.S. v. Hinton,* 31 F.3d 817 (9th Cir. 1994); *U.S. v. Russell,* 971 F.2d 1098 (4th Cir. 1992); *Virgin Islands v. Harris,* 938 F.2d. 401 (3rd Cir. 1991; *U.S. v. Hogue,* 827 F.2d 660 (10th Cir. 1987); *U.S. v. Naranjo,* 710 F.2d. 1465 (10th Cir. 1983); *People v. Zack,* 184 Cal.App 3d 409 (1986).

After an assertion of a self-defense plea, see, e.g., *State v. Swavola,* 114 N.M. 472 (Ct. App. 1992); *State v. Reneau,* 111 N.M. 217 (Ct. App. 1990); *State v. Bazan,* 90 N.M. 209 (Ct. App. 1977); *Engstrom v. Superior Court,* 20 Cal. App.3d 240 (1971); *People v. Worthy,* 109 Cal. App. 3d 514 (1980); *Rushin v. State,* 348 S.E. 2d 910 (Ga. 1986) (irrelevant where no defense of justification or self-defense); *Pitcock v. State,* 420 SW. 2d 719 (Tx. 1967) (irrelevant where defendant knows of no violence by victim).

For admissibility of prior conduct of victim, see, e.g., New Mexico Rules of Evidence 11-404(a) & -608; *State v. Chamberlain,* 112 N.M. 723 (1991); *State v. Vigil,* 110 N. M. 254 (1990); *State v. Bazan,* 90 N.M. 209 (Ct. App. 1977); *People vs. Harris,* 767 P.2d 619 (Ca. 1989); *Rushin v. State,* 348 S.E.2d 910 (Ga. 1986) (irrelevant where no justification or self-defense issue); *Pitcock v. State,* 420 S.W.2d 719 (Tx. 1967) (irrelevant where defendant did not know of any prior violence by victim).

When self-defense is in issue, see, e.g., New Mexico Rules of Evidence 11-404(a); *State v. Vigil,* 110 N. M. 254 (1990); *State v. Swavola,* 114 N.M. 472 (Ct. App. 1992).

When credibility of the witness is in issue, see New Mexico Rules of Evidence 11-608 and 11-404; *State v. Bazan,* 90 N.M. 209 (Ct. App. 1977).

For admissibility of evidence of prior abuse to victim from previous partners, see, e.g., New Mexico Rules of Evidence 11-413; *State v. Peters,* 123 N. M. 446 (1997); *State v. Allen,* 91 N.M. 759 (Ct. App. 1978); *U. S. v. Russell,* 971 F.2d 1098 (4th Cir. 1992) *U.S. v. Hogue,* 827 F.2d 660 (10th Cir. 1987).

10.7 The Hearsay Rule, Exceptions and Related Issues

As discussed throughout this chapter, alleged victims of domestic violence may not testify at trial as the prosecution expects. Consequently, prosecutors may attempt to prove their case by introducing other evidence of the defendant's assault on the victim. This evidence often takes the form of out-of-court statements, either written or oral, made by the victim, responding police officers, or other witnesses. These typically are called "hearsay" statements.

Although the general rule is that hearsay is not admissible as evidence, this rule has numerous exceptions that allow hearsay statements to be admitted if they were made under circumstances that ensure their reliability. Hearsay is considered to be reliable if it falls into one of the “firmly rooted” hearsay exceptions (which are contained in our rules of evidence) or if the evidence has “particularized guarantees of trustworthiness.” In addition, not all out-of-court statements are even defined as hearsay. This section covers only those hearsay exceptions that are especially relevant to domestic violence, such as excited utterances, present sense impressions, and statements made for purposes of medical diagnosis or treatment.

The hearsay rules are found in Rules 11-801 through 11-806 of the New Mexico Rules of Evidence. Note that the rules use the term "declarant" to mean the person who makes a statement that later is offered as evidence in a case.

10.7.1 Constitutional Considerations

Under the Confrontation Clauses of the 6th Amendment to the U.S. Constitution (applied to states through the 14th Amendment) and Article II, Section 14 of the New Mexico Constitution, criminal defendants have a right to cross-examine witnesses against them. This right may be compromised when a hearsay statement is admitted into evidence without the declarant being available for cross-examination. Consequently, the U.S. Supreme Court has ruled that when hearsay evidence offered against a criminal defendant is testimonial and the declarant is unavailable to testify, the federal Confrontation Clause prohibits admission of the evidence unless the defendant had a prior opportunity to cross-examine the declarant. See *Crawford v. Washington*, 541 U.S. 36 (2004).

The Supreme Court stated that the “core class” of testimonial statements requiring the opportunity for cross-examination may include *ex parte* in-court testimony (or its functional equivalent) and extra-judicial statements contained in formalized testimonial materials. Examples may include:

- Affidavits.
- Depositions.
- Statements made while in police custody.

- Statements made in response to police interrogation.
- Confessions.
- Prior testimony at a preliminary hearing, before a grand jury or during a former trial that the defendant was unable to cross-examine.
- Similar pretrial statements that declarants would reasonably expect to be used in a prosecution.
- Statements made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for use at a later trial.

Since *Crawford*, New Mexico's appellate courts have held hearsay evidence to be testimonial under the *Crawford* decision in three cases. See *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309; *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348; *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404. In all three cases, the court held that admission of an unavailable accomplice's statement violated the defendant's confrontation rights because the statements were made while in police custody. According to the court, statements made during a custodial interview fall "squarely within the class of 'testimonial' evidence" described by *Crawford*. *Johnson*¸ 2004-NMSC-029, ¶7; *Alvarez-Lopez*, 2004-NMSC-030, ¶24; *Duarte*, 2004-NMCA-117, ¶13. Because the defendants in these three cases had no opportunity to cross-examine the accomplice, admission of the testimonial hearsay statement violated each defendant's right to confrontation, even though the statements otherwise fell into the statement-against-penal-interest exception to the hearsay rule.

Nontestimonial Statements

In *Crawford,* the United States Supreme Court also identified types of evidence that are ordinarily admissible under exceptions to the hearsay rule that are *not* testimonial, and therefore admissible against defendants in criminal cases, including:

Business records.

Statements made in furtherance of a criminal conspiracy.

The New Mexico Supreme Court recently added blood alcohol reports to this list of nontestimonial hearsay evidence. In *State v. Dedman*, 2004-NMSC-037, ¶30, the Court determined that a blood alcohol report is not testimonial evidence because it is "generated by [State Laboratory Division] personnel, not law enforcement, and the report is not investigative or prosecutorial." The Court further explained that even though "the report is prepared for trial, the process is routine, non-adversarial, and made to ensure an accurate measurement." By characterizing the blood alcohol report as nontestimonial, the *Crawford* requirement of prior cross-examination did not apply and the report could be admitted under the public record exception to the hearsay rule.

To summarize, before admitting hearsay evidence, New Mexico courts must now consider whether the hearsay in question is a "testimonial statement." If the hearsay is

testimonial and the proponent has demonstrated that the witness is unavailable to testify, the court cannot admit the hearsay evidence unless the defendant had an opportunity to cross-examine the declarant before trial, even if the hearsay falls into one of the established hearsay exceptions.

10.7.2 Excited Utterances

An excited utterance is a statement relating to a startling event or condition made while under the stress and excitement of the event or condition. New Mexico Rules of Evidence 11-803(B). According to *State v. Maestas*, for a statement to be admissible as an excited utterance,

> [t]here must be some shock, startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting. The utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. [And,] the utterance must relate to the circumstances of the occurrence preceding it.

Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978) (internal quotations and citations omitted). Under this approach, there is no fixed amount of time in which the statement must have been made. As a result, the Court in *Maestas* admitted statements the victim made to her mother shortly after the beating and while still under the stress of excitement from the beating, but did not admit statements the victim made later that evening and the next morning.

Similarly, the Court of Appeals has held that there is no:

> bright-line rule that every statement made in response to a question, whether by police or others, is not an excited utterance. Rather, we follow our general approach to excited utterances, which requires the trial court to consider the particular circumstances of each case to determine whether the statement was the result of reflective thought or whether it was rather a spontaneous reaction to the exciting event.

State v. Bonham, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154. The Court in *Bonham* held that the victim's statements--made to police within moments of being attacked, while still bleeding, in pain, and in mild shock, and while the victim was still within the proximity of his attacker--were admissible as excited utterances, but that statements victim made hours later, while in the hospital, were not so admissible. See also *State v. Hernandez*, 1999-NMCA-105, 127 N.M. 769, 987 P.2d 1156.

According to Rule 11-803, excited utterances are "not excluded by the hearsay rule, even though the declarant is unavailable as a witness." However, in *State v. Lopez*, 1996-NMCA-101, ¶21, 122 N.M. 459, the Court of Appeals held that the Confrontation Clause of the New Mexico Constitution, which guarantees criminal defendants the right to confront the

witnesses against them, requires the state to show that the declarant is *unavailable* before an excited utterance may be admitted into evidence if the declarant is not testifying at trial. According to the Court, requiring a showing of unavailability "increases the apparent legitimacy of the trial process" and prevents prosecutors from "distort[ing] the search for the truth as a matter of tactical advantage, such as by substituting a high-performance witness to the declarant's statement for a low-performance declarant." *Lopez*, 1996-NMCA-101, ¶19. (Although the Court's ruling requiring a showing of unavailability applies only to excited utterances, its rationale may apply to other hearsay exceptions, such as present sense impressions and statements made for purposes of medical diagnosis or treatment, which are discussed below.)

Excited utterances are unlikely to raise the confrontation clause problems presented in *Crawford v. Washington*, 541 U.S. 36 (2004), because an excited utterance is unlikely to be considered a "testimonial statement." See, e.g., *Hammon v. Indiana*, 809 N.E.2d 945 (Ind. Ct. App. 2004)(holding that a domestic violence victim's excited utterance, which was made to a police officer at the scene of the crime, was not testimonial); *State v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004) (holding that a 911 call in a domestic violence case is not testimonial and is therefore admissible as an excited utterance even without present or prior opportunity for cross-examination); *State v. Forrest*, 596 S.E.2d 22 (N.C. Ct. App. 2004) (holding that a victim's spontaneous statement made to police immediately after being rescued is part of the criminal incident, rather than part of the prosecution that follows; as such, the statement is not testimonial and the Confrontation Clause is not implicated).

10.7.3 Present Sense Impression

A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." New Mexico Rules of Evidence 11-803(A).

To be admissible as a present sense impression, "the statement must be made while the event or condition is being perceived by the declarant or immediately thereafter. The fact that the event occurred contemporaneously or shortly thereafter is a factor to be considered in determining the trustworthiness of the statement." *State v. Perry*, 95 N.M. 179, 619 P.2d 855 (Ct. App. 1980). "[T]he admissibility of the statement will depend upon the trial court's view of the type of case, the availability of other evidence, the verifying details of the statement and the setting in which the statement was made. In addition, the statement must be one which describes or explains the event or condition. This requirement must not be viewed so narrowly as to exclude evidence which would aid the jury. . . . Relevancy and contemporaneousness are the keys of admissibility." *State v. Perry*, 95 N.M. 179, 619 P.2d 855 (Ct. App. 1980).

For example, the victim's words of greeting to the defendant, which were uttered just before the defendant shot the victim, were admissible under the present sense impression exception in order to identify defendant as the shooter. *State v. Salgado*, 1999-NMSC-008, 126 N.M. 691, 974 P.2d 661. In another case, *State v. Peters*, 1997-NMCA-084, ¶32, 123 N.M. 446, 944 P.2d 896, the Court of Appeals summarily concluded that the testimony of a police

officer concerning a victim's statement made on the night she was beaten, raped and robbed, while she was crying and bleeding, was admissible as a present sense impression.

According to Rule 11-803, present sense impressions "are not excluded by the hearsay rule, even though the declarant is available as a witness." But see §10.7.2 above for a discussion of *State v. Lopez,* 1996-NMCA-101, ¶21, 122 N.M. 459, which held that the Confrontation Clause requires proof of unavailability before an excited utterance may be admitted into evidence.

For purposes of determining whether present sense impressions are subject to the Confrontation Clause requirements of *Crawford v. Washington*, 541 U.S. 36 (2004), it is likely that they will be deemed nontestimonial for the same reasons that excited utterances have been deemed nontestimonial: the statements are made during or immediately after the event or condition being described and before there is time for reflection or fabrication. More importantly, these statements can be seen "as part of the criminal incident itself, rather than as part of the prosecution that follows." *State v. Forrest,* 596 S.E.2d 22 (N.C. Ct. App. May 18, 2004) (discussing excited utterances). For example, in *United States v. Griggs*, the federal District Court for the Southern District of New York held that an eyewitness's statement ("Gun! Gun! He's got a gun!"), shouted to a police officer while gesturing at the defendant, was not testimonial because it was not made in response to structured questioning "in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." *United States v. Griggs,* 65 Fed. R. Evid. Serv. (Callaghan) 1109; 2004 U.S. Dist. LEXIS 23695 (S.D.N.Y. Nov. 23, 2004) (internal quotations and citations omitted).

On the other hand, the Court in *People v. Dobbin*, N.Y. slip op. 24534 (Sup. Ct. Dec. 22, 2004), held that a declarant's statement during a 911 call was testimonial because a reasonable person would expect that a report of a robbery to the police would be used in a criminal prosecution. The court acknowledged that the statement was a present sense impression, but because of its accusatory nature and the reasonable expectation that such a statement would be used in a trial, the statement was considered testimonial. These two cases demonstrate that the facts of each case will determine whether a present sense impression will be considered testimonial hearsay.

10.7.4 Statements Made for the Purpose of Medical Diagnosis or Treatment

Statements made for purposes of medical diagnosis or treatment are admissible if they describe "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 diagnosis or treatment." New Mexico Rules of Evidence 11-803(D). Admissibility of this type of statement does not depend on the availability or unavailability of the declarant. New Mexico Rules of Evidence 11-803.

In *State v. Woodward,* 121 N.M. 1, 908 P.2d 231 (1995), a psychologist was permitted to testify as to the victim's identification of her spouse as the perpetrator of domestic abuse

because “disclosure of the perpetrator is essential to diagnosis and treatment of situational depression” in cases involving domestic abuse. Moreover, the victim’s statements to the psychologist were admissible because she “made the statements for the purpose of obtaining medical treatment, and because [the psychologist] reasonably relied on these statements in diagnosing and treating” the victim. *Woodward*, 121 N.M. 1, 908 P.2d 231 (1995).

In *State v. Altgilbers*, 109 N.M. 453, 786 P.2d 680 (Ct. App. 1989), the defendant was charged with sexually abusing two of his daughters. Relying on this exception to the hearsay rule, the court permitted a pediatrician and a psychologist to testify that the two children had identified defendant as their abuser, noting that "in dealing with child sexual abuse . . . disclosure of the perpetrator may be essential to diagnosis and treatment." *Altgilbers*, 109 N.M. at 459, 786 P.2d at 686.

CHAPTER 11

SENTENCING OPTIONS FOR DOMESTIC VIOLENCE OFFENDERS

This chapter covers:

- Identifying and assessing domestic violence offenses.
- Considerations for incarceration versus probation.
- General considerations in ordering batterer intervention.
- Monitoring compliance with conditions of probation.

11.1 Identifying and Assessing Domestic Violence Offenses

11.1.1 Domestic Violence Crimes

The existence of an intimate relationship between the victim of a crime and its perpetrator does not diminish the seriousness of the crime. On the contrary, the close relationship between the victim and perpetrator of a domestic violence crime may enhance the perpetrator's access to the victim and the potential for revictimization. Moreover, when the devastating effects on children are considered, domestic violence crimes pose a far greater potential for harm to society in the long term. Accordingly, it is important for purposes of sentencing that domestic violence crimes be treated no less seriously than similar crimes involving strangers. To reduce the risk of repeat offenses against the victim, a sentence should be imposed as soon as possible after conviction of a domestic violence crime. The most effective sentences motivate change by holding the offender accountable and by conveying the message that the community will not tolerate domestic abuse.

To disrupt the repetitive patterns of domestic abuse, courts increasingly are incorporating batterer intervention strategies into sentencing decisions (see below). Batterer intervention can be used to address any behavior that constitutes a domestic violence crime. Domestic violence crimes are not limited to the more familiar domestic assault and stalking offenses. Domestic abuse takes many forms, so that any crime can be a domestic violence crime if perpetrated within a pattern of controlling behavior directed against an intimate partner.

Moreover, domestic violence crimes are not limited to crimes directed against the person of

the offender's intimate partner. Abusers may attempt to exercise control by using behavior directed against their partners' property, animals, family members, or associates. Crimes that can be associated with domestic violence are as follows:

- **Crimes Against Household Members Act, §30-3-10 et seq.**

  Assault against a household member; aggravated assault against a household member; and assault against a household member with intent to commit a violent felony under §§30-3-12; 30-3-13; 30-3-14.

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  Battery against a household member; and aggravated battery against a household member under §§30-3-15; 30-3-16.

- **Harassment and Stalking, §30-3A-1 et seq.**

- **Use of Telephone to Terrify, Intimidate, Threaten, Harass, Annoy or Offend, §30-20-12.**

- **Kidnapping and False Imprisonment, §30-4-1 et seq.**

- **Sexual Offenses, §30-9-11 et seq.**

- **Injury to Pregnant Woman, §30-3-7.**

- **Child Abuse and Neglect, §32A-4-1 et seq.**

  Also refer to municipal ordinances.

- **Bribery or Intimidation of a Witness; Retaliation Against A Witness, §30-24-3.**

- **Interference with Communications, §30-12-1.**

- **Cruelty to Animals; Extreme Cruelty to Animals, §30-18-1.**

- **Criminal Damage to Property, §30-15-1.**

11.1.2 Court of Record

Metropolitan Court is a court of record for criminal actions involving domestic violence. Rules 7-703, 7-705. This means that a complete transcript of all testimony and a record of all evidence must be maintained by the metropolitan court in any criminal trial in such a case, and that any appeal to the district court is decided on the record made, rather than as a new trial. A criminal action involving domestic violence means an assault or battery under any state law or municipal or county ordinance in which the alleged victim is a household member as defined in the Family Violence Protection Act, §40-13-1.

11.1.3 Lethality Assessment

Once a court has identified a crime as a domestic violence crime, it is critical to assess the lethality of the situation when determining an appropriate sentence. Victims of crimes have a legal right to "be reasonably protected from the accused throughout the criminal justice process." §31-26-4(C). In cases where the court determines that there is a high risk for continuing or lethal violence after any jail term is served, batterer intervention programs or services alone will not be sufficient to protect victims. In these cases, other measures are necessary to limit the offender's access to the victim after the defendant completes the jail term imposed by the court. Such measures may include longer jail time for the offender, community custody programs, and/or "no contact" provisions in orders for probation.

Lethality Factors Checklist

There are a number of factors the court may consider in determining its imposition of sentence. The more of these factors the court finds to be present, the more the court should be certain to address victim safety if the defendant is not sentenced to jail or after release:

- Threats of homicide or suicide
- Fantasies of homicide or suicide
- Suicide attempts
- Depression
- Access to weapons
- The victim has left the batterer
- Pet abuse
- Centrality of battered woman to defendant
- Drug or alcohol consumption
- Increased violent episodes
- Escalation in severity of violence
- Threats to harm children
- Forced or threatened sex acts
- Current life stress
- Rage
- Hostage taking
- Strangulation acts
- Repeated calls for protection by the victim or others
- Symbolic days or events
- Criminal history
- Presence of new relationships
- Expression of blame directed toward victim for perceived injuries to self
- Defiance of court orders and judicial system
- Psychiatric impairment of the victim or abuser
- Abuser's need to control contact with children

- Objectification of partner (calling her names, body parts, animals)
- Extreme jealousy
- Accusations toward victim of promiscuous behavior

11.2 Considerations for Incarceration Versus Probation

11.2.1 Sentencing Assessment

It is critical that the court impose a sentence with the victim's safety in mind. §31-26-4(C). Incarceration, fines, restitution, and probationary sentences are all tools courts can use to hold domestic violence perpetrators accountable for their behavior.

To adequately assess the offender's situation for purposes of sentencing, the National Council of Juvenile and Family Court Judges recommends that courts have information about the following subjects at the time of sentencing for a domestic violence crime.

- Facts of the case;
- Offender's criminal history;
- Offender's prior abusive behavior;
- Offender's drug or alcohol use;
- Offender's mental health;
- Prior and pending court contacts with the offender and his or her family, particularly domestic relations and personal protection actions;
- Children living in the home of the victim or offender; and
- The impact of the violence on the victim and the victim's desires as to the disposition.

Herrell & Hofford, *Family Violence: Improving Court Practic*e, 41 Juvenile and Family Court Journal 15-16 (1990).

In determining the sentence in domestic violence cases, judges often need to consider not only punishment of the batterer but also batterer intervention (see below). New Mexico has not adopted statewide guidelines for batterer intervention. However, in 2003, New Mexico created the Domestic Violence Offender Treatment Fund. To receive this funding, the treatment program must meet certain standards. These standards are discussed below in §11.2.3.

Other states that have enacted guidelines, such as Michigan, have specifically designed their programs to hold domestic violence offenders accountable for their actions and to provide them with an opportunity to change their behavior. Because change is never a guaranteed outcome of participation in a batterer intervention program, care must be taken during the probationary period to reduce the risk of repeat offenses against the victim.

11.2.2 Victim Restitution

One of the options the court has to hold the convicted offender accountable is to order payment of restitution. A victim has a right to restitution under §31-26-4(H). In ordering restitution, courts require the defendant to compensate their victim or the victim's estate for harm suffered as a result of the defendant's conduct. Section 31-17-1(A) allows the court to order restitution for victims of domestic abuse:

> It is the policy of this state that restitution be made by each violator of the Criminal Code to the victims of his criminal activities to the extent that the defendant is reasonably able to do so. This section shall be interpreted and administered to effectuate this policy.

This section defines victims to include "any person who has suffered actual damages as a result of the defendant's criminal activities." §31-17-1(A)(1). It defines actual damages in terms of damages the victim could recover in a civil action. §31-17-1(A)(2). But the definition prevents the court from ordering restitution for punitive damages or pain and suffering. Such damages may still be recoverable through separate civil litigation. Additionally, other persons may be entitled to restitution, including any persons or entities that have compensated the victim or provided the victim with services such as shelter, food, clothing, and transportation, since they have incurred actual damages.

This section requires restitution as a condition of probation or parole if the sentence is wholly or partially deferred or suspended under §31-20-6. Specifically, §31-17-1(B) directs the court to require as a condition of probation or parole:

> [T]hat the defendant, in cooperation with the probation or parole officer assigned to the defendant, promptly prepare a plan of restitution, including a specific amount of restitution to each victim and a schedule of restitution payments.

This subsection goes on to provide for scheduling restitution payments or giving the defendant the opportunity to be heard on why no restitution should be ordered, either because of inability to pay or the lack of any actual damage.

The victim of domestic abuse has other rights under state law--besides safety and restitution--
that should be considered during sentencing. For cases filed before July 1, 2005, these rights include the right to:

- be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;
- timely disposition of the case;
- be reasonably protected from the accused throughout the criminal justice process;
- timely notification of court proceedings if the victim requests notification;
- attend all public court proceedings the accused has the right to attend;
- confer with the prosecution;

- make a statement to the court at sentencing and at any post-sentencing hearings for the accused;
- restitution from the person convicted of the criminal offense that caused the victim's loss or injury;
- information about the conviction, sentencing, imprisonment, escape or release of the accused;
- have the prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work for good cause;
- promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecuting attorney, unless there are compelling evidentiary reasons for retention of the victim's property; and
- be informed by the court at a sentencing proceeding that the offender is eligible to earn meritorious deductions from the offender's sentence and the amount of meritorious deductions that may be earned by the offender.

§31-26-4.

In cases filed on or after July 1, 2005, domestic violence victims have all of the same rights listed above, but they are also entitled to:

- timely notification of all proceedings even if they fail to request such notification; and
- make a statement to the court regarding their rights under the Victims of Crime Act at any proceeding scheduled in the case, not just at sentencing and post-sentencing hearings.

H.B. 692, 47th Leg., Reg. Sess. (N.M. 2005).

Regarding the right to offer victim impact testimony in a capital case, see *State v. Clark*, 1999-NMSC-035, 128 N.M. 119.

11.2.3 Ordering Batterer Treatment in Probationary Sentences

One of the most important considerations for the court when imposing probationary sentences in domestic abuse cases is determining what types of batterer intervention services are appropriate. Section 31-20-6(B) authorizes the court to order the convicted defendant to undergo "available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose." What kinds of problems should be addressed by the treatment services to be ordered as a condition of probation?

To be effective, batterer intervention services must focus on changing the violent behavior patterns of the defendant. Although they may also be needed, alcohol/drug, medical, or mental health treatment is not appropriately addressed through batterer intervention services. A batterer intervention service should refer persons who need assistance in these areas to

other appropriate sources. Treatment programs for drug/alcohol, medical, or mental health problems should not be substituted for batterer intervention services, because such programs are not designed to address domestic violence. These ancillary issues should be addressed concurrently with or prior to the batterer's use of violence within the household.

One area for services that *should* be addressed but is often overlooked when designing batterer services is animal cruelty. There is a strong link between animal cruelty and human violence. The court can order an adult convicted of animal cruelty to obtain psychological counseling. §30-18-1(F). Children adjudicated as having committed cruelty to animals must receive mandatory assessment and counseling. §30-18-1(G). (The AniCare Model of Treatment for Animal Abuse, www.psyeta.org, which is designed to augment the skills of experienced clinicians, specifically addresses issues of animal abuse and works toward stopping the cycle of violence before it spreads to humans.)

If the court orders participation in a batterer intervention counseling program as a condition of probation, it is generally recommended the minimum period of probation be for two years, if that is within the jurisdiction of the court. If the sentence requires *satisfactory* completion of the batterer intervention counseling (rather than mere attendance), probation can be revoked for reasons other than non-attendance. Satisfactory completion would require such things as attendance, payment of fees, participation in group discussions, and compliance with rules. Probationary sentences of less than one year's duration may not create sufficient opportunity to hold abusers accountable, particularly when they do not require the offender to report regularly to a probation officer. Judges who do not have the services of a probation officer may wish to recruit community volunteers to monitor the abuser's progress. Information on recruiting and training community volunteers is available through the Judicial Education Center.

Standards

Some states, recognizing the importance of effective batterer intervention services, and the limited opportunity the court may have to mandate them, adopt standards to help ensure program effectiveness. A comprehensive listing of such standards may be found on the Web site of Michigan Comnet, at http://comnet.org/bisc/standards.html. Michigan itself has enacted batterer intervention standards which recognize that group intervention is preferred to individual sessions because the group setting provides an environment where batterers can see in others their own behaviors, and learn from those who have been working for a longer period of time at making personal changes. Michigan's statewide standards set forth an acceptable minimum duration for group sessions of twenty-six weeks. However, because domestic violence is potentially lethal and tends to increase in frequency and severity over time, interventions of fifty-two weekly sessions or more are recommended as optimal in statewide standards, so long as the court has jurisdiction to order services of such length. See §30-20-5(A) and (B) for the limitations on periods of probation.

Michigan standards have also identified couples and family counseling as *inappropriate* primary intervention for batterers. Because these approaches require joint participation by the abuser and victim, they may put the victim into further danger, or communicate to the

abuser that the victim shares some of the responsibility for the violence. A victim who participates in counseling may also feel compelled to reinforce the batterer's behavior out of fear of reprisals for speaking candidly.

Further, the Michigan standards have recognized that criminal acts are not a subject for negotiation or settlement between the victim and perpetrator, such as through mediation, because the victim does not have any responsibility for changing the perpetrator's criminal behavior. Accordingly, batterers should not be referred to alternative dispute resolution services in lieu of batterer intervention. Batterers exercise control in violent relationships, and alternative dispute resolution services afford them further opportunity to wield this dangerous control over the victim. Michigan standards further caution against approaches that tend to identify the batterer's pathology or external circumstances as the primary cause of battering. These approaches are disfavored because they may reinforce the batterer's denial of responsibility for violence if used inappropriately. Such disfavored approaches include:

- Psychoanalytic therapy that focuses on the perpetrator's past experiences as a primary cause of battering.
- Approaches that deal with battering as primarily a problem of stress management.
- Approaches that deal with battering as primarily a problem of poor communications skills.
- Anger management groups that focus on anger as the primary cause of battering.
- Approaches that substitute addiction counseling for batterer intervention.
- Techniques that identify poor impulse control as a primary cause of violence.

In 2003, New Mexico created the Domestic Violence Offender Treatment Fund. §§ 31-12-12 and 34-15-1 & -2. The Fund will help finance offender treatment programs that have the following components:

- An initial assessment to determine if a domestic violence offender will benefit from participation in the program;
- A written contract, which must be signed by the domestic violence offender, that sets forth:
  - Attendance and participation requirements;
  - Consequences for failure to attend or participate in the program; and
  - A confidentiality clause that prohibits disclosure of information revealed during treatment sessions;
- Strategies to hold domestic violence offenders accountable for their violent behavior;
- A requirement that group discussions are limited to members of the same gender;
- An education component that:
  - Defines physical, emotional, sexual, economic and verbal abuse and techniques for stopping those forms of abuse; and
  - Examines gender roles, socialization, the nature of violence, the dynamics of power and control, and the effects of domestic violence on children;
- A requirement that the program provide monthly written reports to the presiding

judge or the domestic violence offender's probation or parole officer regarding:
- Proof of the offender's enrollment in the program;
- Progress reports that address the offender's attendance, fee payments, and compliance with other program requirements; and
- Evaluations of the offender's progress and recommendations as to whether to require the offender to continue participation in the program; and

- A requirement that the term of the program be at least 52 weeks.

Note: A directory of batterer intervention standards in other states can be found on the Batterer Intervention Services Coalition website, http://comnet.org/bisc/standards.html.

Conditions of Order Deferring or Suspending Sentence

In imposing probationary sentences, courts have great discretion as to the conditions of probation. Section 31-20-6 requires certain mandatory conditions including observing the law and paying the statutory fees for supervised probation service. In addition, the court has broad discretion to include other conditions. Of particular interest in domestic violence cases is the court's discretion to order defendant to provide support, undergo medical or psychiatric treatment, accept the supervision of the corrections department, and perform community service.

In cases involving misdemeanor domestic violence offenses, courts may order defendants to complete treatment programs offered through the criminal justice system. The Bernalillo County Metropolitan Court has developed the Early Intervention Program (EIP), in which a defendant charged with misdemeanor domestic violence assault or battery is given an opportunity to complete a period of treatment under supervision. As one of the prerequisites for entering EIP the defendant must take responsibility for the underlying charges as outlined in the criminal complaint.

11.3 General Considerations in Ordering Batterer Intervention

The purpose of requiring a batterer to participate in an intervention service, such as counseling, is to provide an opportunity for behavioral and attitudinal change, not to punish. To convey the message that domestic violence crimes are just as serious as other types of crimes, it may be necessary for the court to order punitive sanctions (such as jail time or fines) in addition to participation in batterer intervention services. Where a court orders batterer intervention as a condition of probation without accompanying punitive sanctions, it runs the risk of communicating to the offender that domestic abuse is not truly criminal. Another limitation of batterer intervention is that is serves no restorative purpose. Participation in a batterer intervention service should not be substituted for restitution to the victim or the community in the form of compensatory payments or community service.

Most professionals who work with batterers agree that **abusers must be held accountable** for their behavior. Researchers generally agree that domestic violence perpetrators are not suffering from a psychological or biological illness that prevents them from changing their

behavior, except in rare cases involving psychosis or other mental illness. In most cases, researchers believe that domestic violence is a learned pattern of behavior, chosen by the abuser for the purpose of controlling an intimate partner. Since abusers choose to engage in abusive behavior, they can also choose to change. Based on these assumptions, many researchers assert that batterer intervention services should motivate abusers to change by holding them accountable for their behavior. In addition to accountability, **safety** is of primary concern in providing batterer intervention services to abusers. The danger abusers pose to their victims requires service providers to carefully consider the effects of their services on victims' safety.

11.4 Monitoring Compliance with Conditions of Probation

To hold a domestic violence offender accountable and to promote victim safety, the offender must be adequately monitored. If the court orders that an offender participate in a batterer intervention service program, it is also important that the service provider make regular (e.g., monthly) reports to the court or probation officer about the offender's compliance with this condition of probation. The court can promote safety in cases involving domestic violence if its probationary sentences require that the offender report frequently to his or her probation officer. Frequent reporting can also promote accountability and provide incentive for change by regularly informing the offender that his or her behavior is not acceptable. Judges who do not have the services of a probation officer may wish to recruit community volunteers to monitor the abuser's progress. Information on recruiting and training community volunteers is available through the Judicial Education Center.

To reduce the risk of further crimes against the victim, a domestic violence offender should face clear, certain, consistent, and quick consequences for any violation of conditions of probation. Jail time is only one of many consequences the court can impose. In some cases, it may be appropriate and effective to impose alternative sanctions such as more stringent supervision conditions, community service, or community custody. The imposition of incremental sanctions for noncompliance may be appropriate for directing offenders away from ingrained, learned patterns of behavior. Herrell & Hofford, *Family Violence: Improving Court Practic*e, 41 Juvenile and Family Court Journal 34 (1990).