

Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide



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While there are rules of evidence to direct judges in determining who qualifies as an expert, practical resources are lacking to help judges critically review the expert testimony of child custody evaluators, determine whether the evaluator's testing methods were accurate and reliable, or tease out the biases of individual clinicians, particularly when domestic violence is involved. This publication is designed to be a practical tool for judges on how to order, interpret, and act upon child custody evaluations and includes bench cards and supplementary materials.

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Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

Not every case will require or need an evaluation. This tool is written primarily to help judges determine whether ordering an evaluation is appropriate and, if so, to ensure that the evaluations they order are of high quality and properly attentive to the issues raised by domestic violence. However, a pressing concern for many judges is obtaining independent information to facilitate decision making when neither the parties nor the courts can afford an evaluation or investigation.¹ This tool can still be helpful, enabling judges to form partial solutions in specific cases and providing ideas for system change.

Introduction

Why a Tool with a Domestic Violence Focus?



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

It is more likely than not, according to current research,² that judges presiding over contested custody cases will have to grapple with two related questions:

- whether one parent has been physically violent or otherwise abusive to the other, and, if so,
- how that violence or abuse should affect the court's decisions about ongoing custody and visitation arrangements.

In at least some cases, you may decide to use formal custody evaluations to assist you in answering those two questions: to frame the issues; gather the relevant evidence, analyze and synthesize it; and offer it to you in a format that will facilitate your decision making. The primary function of this tool is to help you determine whether ordering an evaluation in such a case is appropriate and, if so, how to become a more critical consumer of the evaluation—not just in cases in which there is a record of domestic violence, but also in cases in which domestic violence is alleged, or where the presence of other “red flags” raises a suspicion of domestic violence.

The quality of custody evaluations, therefore, is of critical importance. Yet, not all the experts on whom courts rely have the training and experience needed to collect the evidence adequately, evaluate it competently, or make well-supported recommendations.³ This is particularly true when a case involves domestic violence.⁴ Although it may be your experience that certain custody evaluators with whom you have worked in the past are good, it remains imperative that you critically examine *all* custody evaluation reports.

This tool will help you:

- determine whether the case is one that requires an evaluation;
- determine what the content of the evaluation should be;
- select the right person to conduct the evaluation;
- tailor the evaluation to your needs;
- critique it carefully; and
- know, at the end, whether or to what extent you can rely on the evaluator's report.

¹ The functions of “evaluation” and “investigation” are discussed *infra*, beginning at p. 16.

² Peter G. Jaffe, Claire V. Crooks & Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. & Fam. Ct. J. 57, 58 (2003) (citing several studies that highlight the prevalence of custody cases with a history of domestic violence); see also, AM. PSYCHOL. ASS'N, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 100 (1994) (stating that custody and visitation disputes appear to occur more often in cases in which there is a history of domestic violence).

³ For purposes of this Guide, “evaluation” refers only to the work product of those professionals qualified to evaluate the data and form an opinion about the parties in a contested custody case based upon their training and experience. Court practice is sharply divided on the question of asking evaluators or investigators to make recommendations. However, opinion is unanimous that judges, not evaluators, make the ultimate best-interests determination.

⁴ See, e.g., TK Logan et al., *Child Custody Evaluations and Domestic Violence: Case Comparisons*, 17 VIOLENCE AND VICTIMS 719, 735 (Dec. 2002) (the authors state that “...this study suggests that evaluators do not appear to investigate the nature or extent of domestic violence...and more specifically, do not explore domestic violence as a way of attending to the child's safety interests”).



By becoming a more demanding consumer, you will also assist the evaluators on whom you rely to increase their expertise in this difficult work.

Organization

In the bench cards provided here, as well as in these supplementary materials, we guide you chronologically through the process, asking with you:

- I. Is this a case that would benefit from an evaluation that includes a domestic violence focus?
- II. What should the scope of the evaluation be, and whom should I ask to conduct it?
- III. How should the final report itself be evaluated? How should I use it?

The cards and the supplemental text use an identical format, allowing you to refer easily from one to the other. **The text expands upon the information found on the cards. In order to make full use of this tool, you should read the cards first or read the supplemental text alongside the cards.**

At the end of these materials, you will also find a list of additional resources, many of them available on the Internet. The remainder of this introduction offers a context for the tool, by defining domestic violence and highlighting critical aspects of the legal and ethical framework governing any case in which domestic violence is known to be, or may be, an issue.

How to Define Domestic Violence⁵

Domestic violence is complex.⁶ For purposes of this tool, we are defining it as a pattern of assaultive and coercive behaviors that operate at a variety of levels—physical, psychological, emotional, financial, and/or sexual—that perpetrators use against their intimate partners.⁷ The pattern of behaviors is neither impulsive nor “out of control,” but is purposeful and instrumental in order to gain compliance from or control over the victim.⁸ The presence of domestic violence, as well as any violent or abusive behavior that does not fit this description, will always be relevant to the question of what custody or visitation arrangement will serve the best interests of any children shared by the adult parties.⁹

⁵ For purposes of this tool, we use neutral language when referring to the abusive parent and the non-abusive parent. However, research shows that men abuse women at far higher rates than women abuse men. See BUREAU JUST. STAT., U.S. DEP’T JUST., FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1 (2005) at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf> (last visited Aug. 25, 2005) (finding that females were 84 percent of spouse abuse victims, 86 percent of victims of abuse by a boyfriend or girlfriend, and 58 percent of family murder victims). See also PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN iii – 61, iv (November 2000) (finding that women (64 percent) were significantly more likely than men (16.2 percent) to report being raped, physically assaulted, and/or stalked by a current or former intimate partner and that women who were raped or physically assaulted by a current or former intimate partner were significantly more likely to sustain injuries than men who were raped or physically assaulted by a current or former intimate partner).

⁶ See Loretta Frederick, Battered Women’s Just. Project, *Context Is Everything* (2001) at <http://www.bwjp.org/documents/context%20is%20everything.htm> (last visited Dec. 6, 2005) (examining how people use violence in their relationships and highlighting that “[i]n order to intervene effectively in these cases, it is important to understand the complex issues of violence within intimate relationships, including the intent of the offender, the meaning of the act to the victim and the effect of the violence on the victim; the context within which any given act of violence occurred. Other relevant factors include the particulars of the incident, and how much violence, coercion, or intimidation accompanied the violent event.”)

⁷ This definition is derived from Anne L. Ganley, *Understanding Domestic Violence: Preparatory Reading for Trainers* in ANNE L. GANLEY & SUSAN SCHECHTER, DOMESTIC VIOLENCE: A NATIONAL CURRICULUM FOR CHILD PROTECTIVE SERVICES 1-32 (Janet Carter, et al. Ed., 1996) (pointing out that, unlike stranger-to-stranger violence, domestic violence abusers have ongoing access to the victim, especially when they share children, and can continue to exercise a great deal of physical and emotional control over the victim’s daily life).

⁸ Ganley, *id.* at 5.

⁹ See, e.g., SUSAN L. KEILITZ ET AL., NAT’L CENT. FOR ST. CTS., DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS 3 (1997) (providing that by identifying domestic violence in cases, courts can help victims protect themselves through safety planning and referral to support services; ensure victims are not compelled to participate in court proceedings that may place them in further danger; and prevent abusers from manipulating their victims and the judicial process by crafting specific court orders).



In some cases, there will be a public record of violence or abuse (police reports; 911 calls; criminal, civil, or protection order case information) and private records (from medical, mental health, substance abuse, shelter, and other service providers); in many others there will be explicit allegations, including allegations of child sexual abuse,¹⁰ and often counter-allegations; in still others there will be indications of disturbance in the family that may or may not, upon further investigation, be related to violence or abuse. There also exist many other collateral issues that could obscure the fact that domestic violence is present in the case. We have called these the “red flag” issues that should prompt further inquiry into the presence or absence of domestic violence. See Card I, Side 2, and accompanying supplemental material.

Domestic violence may not be easily detectable in relationships where the violence is hidden, or where most of the abuse is not physical in nature. Abusive partners can often appear charming, “in charge,” and sincere in their commitment to their families even when their behavior, if we knew it, would tell another story; partners who have suffered abuse may appear to be unreliable witnesses, often seeming to be unappealing, disorganized or emotionally unstable. The parties are likely to hold radically different perceptions of their relationship and of one another; and abusers are often motivated to deny or minimize their abusive behavior.¹¹ It is particularly important in these cases to test what the parties say against other available evidence, including patterns of assaultive and coercive behaviors in past relationships, in relationships with other family members, or in relationships outside the family. Even if none of the collateral contacts has ever witnessed the abuse or violence, the absence of witnesses to the violence or its aftermath does not conclusively prove that it did not take place. Furthermore, an absence of convictions for domestic violence or violations of restraining/protection orders does not mean that a parent is not abusive.¹²

The Legal Context

In cases involving known or suspected domestic violence, as in most contested custody cases,¹³ the court’s fundamental task is to determine specifically how and to what extent each child has been affected by what has gone on inside the family; the quality of the child’s relationship with each parent (both historically and at the present time); each parent’s capacity to meet the child’s needs; and how best to assure the child’s ongoing physical, psychological and emotional well-being.

Even when they are not themselves physically or sexually abused,¹⁴ when there is violence at home children are aware of and affected by it, although often parents would prefer to think, and may say, that they are not. As a significant and growing body of research attests, exposure to physical violence at home hurts children, although the extent of that injury differs from child to child,¹⁵ even within the same home. We are using the term “exposure” to signal that children are affected not only when they are present at the violent incident, but also when they hear it, see it, or see

10 See Lundy Bancroft & Jay Silverman, *Assessing Abuser’s Risks to Children in* PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION 107 (Peter Jaffe, Linda Baker & Alison Cunningham eds., 2004) (discussing the substantial overlap between domestic violence and child sexual abuse); and Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE AND NEGLECT 151-163 (1990) (underscoring the need to take child sexual abuse allegations seriously).

11 See AM. PSYCHOL. ASS’N., *supra* note 2, at 40 (stating that custody and visitation provide domestic violence abusers with an opportunity to continue their abuse, and that such abusers are twice as likely to seek sole physical custody of their children and more likely to dispute custody if there are sons involved).

12 See Etiony Aldarondo & Fernando Mederos, *Common Practitioners’ Concerns About Abusive Men*, in PROGRAMS FOR MEN WHO BATTER: INTERVENTION AND PREVENTION STRATEGIES IN A DIVERSE SOCIETY 2-4 (Etiony Aldarondo & Fernando Mederos eds., 2002) (hereinafter PROGRAMS FOR MEN WHO BATTER) (stating that many physically abusive men are never arrested or brought to trial even though they have a long history of violence toward a partner).

13 When we use “custody” in this tool, we include both sole or joint physical custody and sole or joint legal custody.

14 But see Red Flag Cases, *infra* p. 14 (regarding the significant overlap of child maltreatment and domestic violence). See also Bancroft & Silverman, *supra* note 10.

15 See PETER G. JAFFE, NANCY K.D. LEMON & SAMANTHA E. POISSON, CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 21-28 (2003); see also, Jeffrey L. Edleson, *Problems Associated with Children’s Witnessing of Domestic Violence* (April 1997, revised April 1999) at http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_witness.pdf (last visited Dec. 6, 2005).



or feel the aftermath—such as a parent injured or in distress, furniture knocked over, things broken, blood on the wall or floor. They are affected, too, when they are forced to live in an atmosphere of threat and fear created by violence. And they are affected by a parent's use of abusive behaviors that stop short of physical violence, whether those behaviors are directed primarily toward a partner, or characterize the abusive parent's relationships with partner and children alike.¹⁶

This is why judges are now almost universally under a statutory obligation to consider domestic violence as a factor when determining the best interests of children. It is why many judges are under a statutory obligation to presume that a perpetrator of domestic violence is not someone who should be given either joint or sole physical or legal custody of a child or be given unrestricted visitation with the child.¹⁷ The definitions of "domestic violence" underlying these specific statutory obligations may be narrower, and more focused on physical violence, than the broader definition we have proposed. But because domestic violence in the broader sense hurts children, it is incumbent on judges in custody or visitation decisions based on the best interests of a child, regardless of particular statutory obligations, to have an accurate picture of the violence or abuse perpetrated by one parent against the other or against a child, *and* to consider its implications for the child after the parents separate. It is also important to understand that the impact of domestic violence on children may be mitigated by certain protective factors, such as a supportive relationship with the non-abusive parent.¹⁸

The Ethical Context: Safety First¹⁹

When you make a determination or approve a parental agreement about custody and visitation, you are trying to create an environment in which children are more likely to flourish, both physically and emotionally. The emotional and physical safety of the children and an abused parent must be a paramount consideration. Children do not flourish if they are not, or do not perceive themselves to be, safe or if they perceive a parent to be at risk. Abused parents must be assured of their own safety, to the greatest extent possible, so that they in turn can provide a safe and secure environment for their children.

Cases involving domestic violence can create acute risks for an abused parent and his or her children; and we cannot determine with any certainty, especially at the outset, exactly which case, or which circumstances, contain or create those risks. Contrary to earlier thinking, in many cases, separation increases, rather than reduces, the risks of harm to an abused parent or to the children.²⁰ Physical, sexual, or emotional abuse or threats of abuse of the children post-separation may be a powerful tool in the abuser's continuing control over the other parent. Lethal violence occurs more

16 See, e.g., JAFFE, LEMON, & POISSON, *id.* at 30-31 (discussing batterers as role models and how they often undermine the non-abusive parent's authority); see also LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2002).

17 See, e.g., LA. REV. STAT. ANN. § 9:364 (creating a rebuttable presumption against awarding sole or joint custody to a parent who has a history of perpetrating family violence; identifying factors to overcome presumption; and restricting visitation to only supervised if such a finding is made) and TEX. FAM. CODE ANN. § 153.004 (creating a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child). See also, NAT'L COUNCIL JUV. & FAM. CT. JUDGES, *MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE* §§ 401-403 (1994) [hereinafter *MODEL CODE*] (creating a rebuttable presumption against sole or joint physical or legal custody to an abusive parent (401), requiring the safety and well-being of the child and the victim be a primary consideration for the court (402), and creating a rebuttable presumption that it is in the best interest of the child to reside with the non-violent parent in a location of that parent's choice, within or outside the state (403)). For a list of those states that have enacted a rebuttable presumption against custody or visitation to an abusive parent, contact the Resource Center on Domestic Violence: Child Protection and Custody at (800) 527-3223.

18 See JAFFE, LEMON, & POISSON, *supra* note 15, at 27-28 (providing a table that identifies risk and protective factors in domestic violence cases and stating that domestic violence should be a fundamental consideration in determining the best interests of children).

19 When we speak of safety, we are including both physical and emotional safety.

20 Walter S. DeKeseredy, McKenzie Rogness & Martin D. Schwartz, *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge*, 9 *AGGRESSION & VIOLENT BEHAV.* 675 (2004), available at <http://www.ncdsv.org/images/Separationdivorcesexualassault.pdf> (last visited Dec. 6. 2005).



often during and after separation than when the couple is still together,²¹ and children often become the targets of or witnesses to this violence.

It may be helpful to think about three contexts in which concerns about safety can be addressed:

- At the outset of the case, if an existing record or allegations of violence prompt immediate concern about the safety of one or both of the parties or their children. This is addressed on Card I.
- During the litigation and evaluation process, which can (a) create its own risks, and (b) uncover information that triggers immediate concern about the safety of a party or the children. This is addressed on Cards II and IIA.
- In framing final custody and visitation orders, which must ensure the ongoing safety of the parties and their children. This is addressed on Card III.

21 See Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 AM. J. PUB. HEALTH 1089-97 (2003); see also DeKeseredy, Rogness & Schwartz, *id.* at 676 and JAFFE, LEMON, & POISSON, *supra* note 15, at 8.

I

Ordering an Evaluation: When Is Domestic Violence Expertise Necessary?

What If There Are No Resources for an Evaluation?

As Card I suggests, this tool offers you a checklist of information that will be important to your decision making in any case in which domestic violence is known, alleged, or suspected. If you determine that an evaluation is necessary and if neither the parties nor the court has the resources to provide for one, or if a qualified evaluator for a domestic violence case is not available, it may still be possible for you to request that information from the parties' attorneys, from the parties themselves if they are unrepresented, and sometimes directly from the source. Child abuse/protection reports, criminal records, and records of other relevant court activity may fall into the latter category.

The tool may also help you determine which avenues of inquiry are the most crucial, and how to maximize the productivity of an inquiry, so that if you have resources for a limited evaluation, you can allocate those resources effectively. Even this limited evaluation, assuming it is informed by the appropriate domestic violence expertise, can add critical information, supplementing that which is available from the parents and enabling you to make a more appropriate decision with limited resources.

If you order a limited inquiry, it will be important to ensure that the evaluator's conclusions or recommendations do not presume more knowledge than the limited inquiry has in fact produced. For example, children might be "well behaved" in the presence of the abusive parent and "act out" in the presence of the non-abusive parent for a number of reasons not readily apparent to or understood by the evaluator. The opposite could also be true if the children feel safe with a third party present. Therefore, it is critical that evaluators understand the context within which their inquiry takes place and for you to frame the inquiry carefully and to use your authority to make relevant collateral resources available to the evaluator. This may be especially crucial in cases where the parties are unrepresented and have a limited capacity to address effectively any negative conclusions drawn by the evaluator. Exercising critical judgment in your reading of an evaluator's report is a topic addressed extensively on Card III and the accompanying supplemental material.

Is There a Need for an Emergency/Interim Assessment?

If a case seems dangerous from the outset, and if the situation has not already been stabilized, you may need to take immediate action.

In framing temporary orders, you may want to draw on an interim safety assessment performed by a qualified expert—in other words, an interim evaluation with a limited and specific focus on safety. The expert asked to conduct this type of evaluation must be someone with specific expertise and experience in domestic violence and risk assessment.²²

Research into domestic violence homicides underscores the fact that our ability to measure risk is still quite imperfect. This in itself suggests that caution is advisable. However, the research does provide some valuable guidance, and suggests the following areas of inquiry as most important for an emergency/interim safety assessment:

- the abusive partner's employment status, paying particular attention to voluntary unemployment or underemployment as well as involuntary unemployment (unemployment is the most significant socio-demographic risk factor);
- whether the abusive partner has access to firearms, has made previous threats with a weapon, or has previously threatened to kill;

²² The local domestic violence program or the domestic violence unit for the police department or prosecutor's office may be a good resource.

- whether the abusive partner has threatened or attempted suicide;
- whether the abusive partner has a history of alcohol/drug abuse;
- the level of control exercised by the abusive partner: the more controlling a partner has been in the relationship, the greater the risk created by a separation;
- whether there is a child in the home who is not the abusive partner's biological child;
- whether the abusive parent is excessively jealous of the non-abusive parent, including being jealous of any new relationships of the non-abusive parent; and/or
- whether there have been incidents of violence or threatening behavior since the separation.²³

Once Safety Is Assessed and If Resources Are Available, Should I Order an Evaluation?

The Clearest Cases

There will be cases in which the evidence is clear, and no further evaluation is necessary to determine that a child's best interests will be served by granting custody to the non-abusive parent. That determination may be driven by a statutory presumption against granting custody or visitation to the abusive parent under such circumstances, or by the court's own judgment after a broader examination of any violence or abusive behavior.

There will be many cases in which a parent who has perpetrated acts of violence or abuse against the child or other parent nonetheless seeks visitation. The potential for harm, and the need for extreme caution in these circumstances, suggests that if the court is inclined to consider such a request, it may be necessary to determine (a) the motivation for the request; (b) the impact ongoing contact will have on the children or on their relationship with the abused parent; and (c) whether visitation should occur and, if so, how it might be structured to assure the safety of the children and abused parent, sometimes limiting access to strictly supervised visitation.

There will be still other cases involving a limited record of domestic violence in which one of the parties will contest the legitimacy of that record or its relevance to custody and visitation determinations. And there will be cases involving allegations, and perhaps counter-allegations, of domestic violence in which there are no public records to serve as substantiation.²⁴ These cases may benefit from a careful investigation, or evaluation under limited circumstances, conducted within specific parameters established by you. In order to understand fully the impact of a party's assaultive and coercive behavior on the other party or the children, it may be important that an investigation or evaluation carefully examine the existence of such behavior in the allegedly abusive party's prior or current relationships.²⁵

A History of Physical Violence

Concerns are frequently raised that neither the laws governing the issuance of civil restraining/protection orders, nor the laws governing criminal domestic assault cases, sufficiently distinguish between the primary perpetrator of violence in an abusive relationship, and a partner who may be using violence defensively.

In the civil restraining/protection order and criminal contexts, the focus is on specific acts or threats of violence, stalking, or sexual assault. The family court system has both the luxury and the obligation to look more broadly at the dynamics within the family, and to ask whether one partner is abusing the other as a means of coercive control and what the implications of that abuse are for each member of the family. In cases with this profile, a careful examination may reveal that although both parents have a record of violence,

²³ For a more complete discussion on risk factors, see Campbell et al., *supra* note 21, and Jacquelyn C. Campbell, *Danger Assessment* (2004) at <http://www.dangerassessment.org> (last visited Dec. 6, 2005).

²⁴ For information on why there may be no documentation of the abuse, see Sarah M. Buel, *Fifty Obstacles to Leaving a.k.a. Why Abuse Victims Stay*, 28 COL. BAR J. 19 (October 1999).

²⁵ However, exploring the context of other relationships may not be possible because of lack of funding, or the evidence derived from such evaluation or investigation may be irrelevant and inadmissible.

only one of the parents poses any ongoing risk to the children or the other parent, or that the parent with a record of violence is actually the victimized partner, not the abuser.

The Red Flag Cases

Perhaps the most difficult and important case is the “red flag” case (see Card I, Side 2). This is the case in which no record or allegation of domestic violence surfaces when the parties first come to court, and yet the children may have been exposed to domestic violence and/or abused themselves, and may be at risk in the future unless further inquiry is made to inform your best-interests analysis properly.

- Substance abuse, while it does not cause or excuse domestic violence, often co-occurs with it, and can certainly precipitate particular incidents. Substance abuse on the part of an abused partner may or may not be a form of self-medication.
- Mental illness can produce violence, but it can also be the product of exposure to violence or abuse.
- Child abuse, according to current research, may occur in 30 percent to 60 percent of households (depending on the study) in which the mother is also being abused.²⁶ In cases in which mothers are assaulted by the father, daughters are 6.51 times more at risk of sexual abuse than daughters in homes without domestic violence.²⁷
- Post-traumatic stress disorder symptoms (which include those listed on Card I: sleep disturbances, bedwetting, excessive separation anxiety, hyperactivity, withdrawal, aggression or other behavioral problems; depression or anxiety; or regressive behaviors) are important, and it should be determined whether those symptoms result from the abuse of the children or from their exposure to parental violence.
- A lop-sided agreement in an uncontested case, particularly when both parties, or the party who seems to be giving most away, are unrepresented, raises the concern that the “losing” party may not be able to assert his or her own interests and that the agreement may not be in the best interests of the children, perhaps because of patterns of violent or coercive and controlling behavior by the abusive parent.
- Estrangement²⁸ of children is alleged in many custody disputes; however, when determining the credibility of such allegations, it is important to keep in mind that children who appear estranged from a parent may have legitimate and substantial reasons for being angry, distrustful, or fearful.²⁹ How to understand issues of estrangement and protection in cases involving domestic violence is treated more fully in the supplementary materials to Card III (p. 24). Perpetrators of domestic violence often accuse their partners of turning the children against them, or may turn the children against their partners, while denying their own behavior—highlighting the importance of determining whether domestic violence is present in cases in which that accusation is made.
- Each parent’s capacity to meet the children’s emotional needs is impacted by the presence of domestic violence. In examining a parent’s capacity to meet the children’s needs, it is important to recognize and understand the impact of an abusive parent’s assaultive and coercive behaviors on the children and the vulnerable parent; as well

26 See, Nat’l Clearinghouse on Child Abuse & Neglect Info., *In Harm’s Way: Domestic Violence and Child Maltreatment* 1 (1999). See also JEFFREY L. EDLSON & SUSAN SCHECHTER, NAT’L COUNCIL JUV. & FAM. CT. JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 9 (1999) (citing NAT’L RES. COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT (1993)).

27 Barbara J. Hart, *Children of Domestic Violence: Risks and remedies*, at <http://www.mincava.umn.edu/documents/hart/hart.html> (last visited July 15, 2005) (citing Lee H. Bowker, Michelle Arbitell & J. Richard McFerron, *On the Relationship Between Wife Beating and Child Abuse in FEMINIST PERSPECTIVES ON WIFE ABUSE* (Kersti Yllo and Michele Bograd Eds., 1988)).

28 We refer to cases in which the children may express fear of, be concerned about, have distaste for, or be angry at one of their parents as being estranged from that parent. We do not use the labels of “parental alienation”, “alienation”, or “parental alienation syndrome” to describe this behavior because to do so would give credibility to a “theory” that has been discredited by the scientific community. See AM. PSYCHOL. ASS’N, *supra* note 2, at 40; see also Carol S. Bruch, *Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases*, 14 CHILD & FAM. L. Q. 381 (2002) and Kathleen Coulborn Faller, *The Parental Alienation Syndrome: What Is It and What Data Support It?*, 3 CHILD MALTREATMENT 100 (May 1998). For a more complete discussion on “alienation”, “parental alienation” or “parental alienation syndrome”, see *infra* p. 24-25 (Determine Whether to Admit the Report into Evidence).

29 See Leslie M. Drozd & Nancy W. Olesen, *It is Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1 J. CHILD CUSTODY 65-106 (Nov. 2004).

as understand that a vulnerable parent is often able to meet the children's needs more effectively once safe from further violence or abuse.

Relocation Cases

One party may request permission to relocate with the children, and the other may resist that relocation, for a number of reasons, more or less persuasive. In at least some cases, the request to move is motivated by self-protection or a desire to protect the children. If there is a hint that the case may involve domestic violence, or the case is one in which a clear motivation for the relocation appears to be missing, it is essential to explore the possibility that safety concerns may be an underlying reason for the request.³⁰

³⁰ In the MODEL CODE, *supra* note 17, the NCJFCJ recognized that abused parents may flee or seek to leave their abuser in order to protect themselves and their children when it set forth two provisions addressing relocation: § 402 (2) prohibits a judge from using a parent's absence or relocation based upon an act of domestic or family violence by the other parent as a factor that weighs against the parent in determining custody or visitation, and § 403 creates a rebuttable presumption that it is in the best interest of the child to reside with the non-abusive parent. *See also* Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. KAN. L. REV. 433 (1998) (addressing the question of "why doesn't she just leave" and highlighting how the abusive parent often uses relocation to continue the pattern of coercion and control).

What Do I Need to Know, from Whom, and How Do I Ask?

If you decide to order a custody evaluation, everyone affected by that order—the parties to the case, their children, the expert who is to conduct the inquiry, and you as the ultimate recipient of the expert’s report—is best served when you articulate clearly what you need to know, when there is a match between the scope of the inquiry and the qualifications of the person assigned to conduct it, and when the process to be followed is well defined and managed by you.

Frame the Inquiry

Investigation, Evaluation, Recommendation

For purposes of this publication, we sweep under the general rubric of “custody evaluation” many different kinds of information gathering. In some cases, you may need only information gathering and a report on what was found. Any of a variety of lay witnesses can perform that function, and we refer to that process in this document as investigation. In other cases, you may need the witness not only to collect and provide information, but also to offer expert opinion testimony about it. We refer to that process as evaluation.

We ask custody evaluators to investigate, process the information they collect, interpret it and draw conclusions from it, which requires that they be qualified as experts if their conclusions and opinions are to be admissible. And we often ask evaluators for recommendations, while appreciating that making custody and visitation determinations is a judicial function, and not one that can be delegated. The guidelines on the cards accompanying these materials offer assistance in negotiating this treacherous terrain.

All custody evaluators investigate. The core function of investigators is to gather and interpret information and report their findings to the court. Professionals with varying backgrounds—child protection workers, law enforcement officers, probation officers, domestic violence advocates—may make good investigators. However, different skill sets will be useful in different investigatory contexts. A lawyer’s familiarity with the legal process and with fact-finding may ease his or her access to police, court or child abuse/protection records, and the task of compiling and reporting on the information contained in them. Both lawyers and mental health professionals are likely to be competent in interviewing adults and older children, and synthesizing and reporting what is said. Obtaining information from younger children, and understanding the limits of its reliability, is a task that a mental health clinician with expertise in child development and up-to-date training on appropriate interviewing techniques will be better qualified to perform than someone without that expertise—even though the task is investigatory, it requires specialized skills.

The line between “investigation” and “evaluation” (in its technical sense) is clearest when the evaluative task requires specific mental health expertise. Suppose a child, or a parent talking about a child, reports that the child is suffering from nightmares, has had trouble concentrating on school work (reflected in poor grades), complains of frequent stomach pain, and has been in trouble for aggressive behavior on the playground. Any competent investigator could collect and report that information, but only a mental health professional would be qualified to conclude from that information that the child is, or might be, suffering from post-traumatic stress disorder. A *diagnosis* of a party’s or a child’s mental health status, in other words, requires particular expertise.

By the same token, it would be appropriate for either an investigator or an evaluator to report that a party or a child was slumped in the chair, did not make eye contact, jumped

when the door closed, spoke so softly as to be barely audible, or was argumentative during the interview. Those are “lay” opinions within the competence of any responsible professional. It would, however, be inappropriate for someone without mental health expertise to say that a party appeared clinically depressed, or to be suffering from borderline personality disorder. Those opinions are conclusions that must be reserved for experts. What investigative and evaluative reports have in common, however, is that they should both be factually based and should include a showing of sufficient time spent with all parties as well as a thorough research of supplemental information from public and private records or third-party interviews. The facts provide you, as the judge, with a basis for weighing the merit of each parent’s contentions and, in the case of a qualified expert, determining whether that expert’s opinion is sufficiently grounded factually.

Some custody evaluators may use evaluations as a means to facilitate resolution of a case, and may not undertake a thorough fact-finding process. However, as the ultimate fact-finder, you are entitled to and need all relevant information. That information should be unfiltered and straightforward. The evaluator should demonstrate how any violence or other abusive behavior was considered in arriving at conclusions or opinions and in making any proposed recommendations. Minimizing domestic violence undermines the validity of the report.

Recommendations to the Court

Many judges and courts feel that even asking a custody evaluator to offer recommendations at the conclusion of his or her report is an inappropriate delegation of judicial authority. Others fear that it will encourage too heavy a reliance on the evaluator, and will discourage judges from their own careful assessment of the child’s best interests. Some require evaluators to offer recommendations, and feel that a report’s utility is significantly reduced if it does not include them. Given the sharp division of opinion on this issue, we offer suggestions for how a judge can review and work with an evaluator’s recommendations, without inappropriately ceding decision-making authority.³¹

Choose the Expert

Family courts use a variety of mechanisms to identify the pool of experts available for appointment as custody evaluators and to select an evaluator in each case. Your practice will, therefore, be dependent on the mechanisms available to you; you will have more or less flexibility depending on how those mechanisms are structured. Within those constraints, as well as the constraints imposed by limited resources, your goal remains finding a person who has the qualifications best suited to the particular inquiry. In some cases, for example, you might need a specific cultural expertise or expertise in a specialty such as substance abuse. Familiarity with a certain custody evaluator should not substitute for a careful assessment of his or her qualifications to evaluate the present case. Even otherwise good custody evaluators who lack the expertise to recognize domestic violence and appropriately factor it into their evaluations can make serious mistakes in how they report on such cases. It is, therefore, important to choose an evaluator who has training and experience in the issues related to domestic violence, including the dangers associated with separation.³²

First and Foremost, Training and Experience in Domestic Violence

Domestic violence is its own specialty. Qualification as an expert in the mental health field or as a family law attorney does not necessarily include competence in assessing the presence of domestic violence, its impact on those directly and indirectly affected by it, or its implications for the parenting of each party. And even though some jurisdictions are

31 In a recent issue of *Family Court Review*, mental health professionals, judges, and attorneys discuss the issues related to the efficacy of evaluators who provide courts with custody recommendations. See 43 FAM. CT. REV. 187 (2005), available at <http://www.blackwell-synergy.com/toc/fcre/43/2> (last visited Dec. 6, 2005).

32 See, e.g., Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); and DeKeseredy, Rogness & Schwartz, *supra* note 20.


now requiring custody evaluators to take a minimum amount of training in domestic violence, that “basic training” by itself is unlikely to qualify an evaluator as an expert, or even assure basic competence, in such cases.

Ideally, your jurisdiction will already have a way of designating evaluators who have particular competence in domestic violence. Where that is not the case, you might test the evaluator’s level of experience and expertise, despite the difficulties inherent in any such inquiry, by asking:

- whether the evaluator has been certified as an expert in, or competent in, issues of domestic violence by a professional agency or organization, if such certification is available. If certification is available, the court should inquire into the criteria for “certification”, and determine if it involved a bona fide course of study or practice;
- what courses or training (over what period of time) the evaluator has taken focused on domestic violence;
- the number of cases involving domestic violence that the evaluator has handled in practice or to which he or she has been appointed, remembering, however, that such experience may *simply* reflect the mechanism used by the court in identifying potential evaluators, rather than any relevant expertise; and
- the number of cases in which the evaluator has been qualified as an expert in domestic violence.

Be Specific about the Information You Need

- **The exposure of children:** As explained in the introductory materials, exposure includes more than directly witnessing violence because children are affected by what they hear as well as by what they see, by the aftermath of violence, and by the atmosphere of fear and threat that characterizes an abusive household.
- **Impact of abusive behaviors on each parent, each child, and each parent/child relationship:** A list of common symptoms of trauma in children is identified in the introduction to these materials. See page 14, The Red Flag Cases. What has not yet been said is that these symptoms can interfere with cognitive and emotional development in children, affect their relationships with adults and peers, impact their school performance, and negatively affect their physical health. The impact of abuse on children’s relationships with both their abusive parent and their non-abusive parent is complex and requires careful exploration. The impact on each child should be evaluated separately. Children are affected differently by the trauma they experience, depending on age, maturity, resiliency, and external supports. While abusive parents frequently allege that their partners have turned the children against them, they often take no responsibility for the fact that their own behaviors have left the children fearful, angry, or distanced, and may have prompted the other parent to try to shield the children from those behaviors. Abusive parents also commonly seek to sabotage the children’s relationship with the other parent, and undermine that parent’s authority, as a means to maintain their own control.³³ These issues are explored further in the supplement to Card III, beginning at page 24, in the discussion of the discredited “parental alienation syndrome.”

 **Short- and long-term safety concerns for children and/or a parent:** The evaluator can glean this information from what has happened in the past, and by talking with the parties and, as appropriate, the children about explicit threats that have been made and threatening behaviors. It is also important to know what the parties and children fear, both because they may be in the best position to predict what will happen, and because even if their fears may appear to be exaggerated or minimized under the circumstances, those fears and the actions taken to address them are relevant to the inquiry into short- and long-term safety concerns for the children and/or a parent.

The most crucial point here is that reports based solely on interviewing and/or observing the parties and their children will rarely, if ever, produce an adequate evaluation in a case known or suspected to involve domestic violence.

Articulate Expected Sources of Information

Since abusive partners may deny and minimize their use of violence and other controlling behaviors, even to themselves, they may present as sincere and caring partners and parents.³⁴ Their expressed concerns about the parenting capacity of their abused partners may be consistent with a longstanding habit of relentless criticism.³⁵ Alternatively, the abused partner may indeed present as a less than competent parent; but his or her deficiencies may result from the emotional and physical toll the abuse has taken, and may to that extent be temporary in nature.³⁶ Children may, in self-protection, have identified with their abusive parent rather than the parent who appears unable to offer protection, and may, in the form of rejection or blame of the victim, express their anger at being unprotected.³⁷

In this complex and confusing environment, an evaluation that reaches conclusions based on the “he said/she said” of conflicting accounts without recourse to other corroborating sources may be inherently unreliable.

Helpful collateral sources may include:

- other family members, friends, neighbors, co-workers (especially of the abused parent), community members, or former partners who have had regular interactions with the family or been involved in particular incidents relevant to the inquiry. Care must be taken in these instances to guard the flow of information so that neither an adult party nor a child is put at increased risk, keeping in mind that the abuse may not have been disclosed to others yet;
- professionals with whom the family has had ongoing associations, such as doctors, teachers, clergy, or counselors;
- professionals (including shelter advocates, child welfare workers, or attorneys) who have become involved with the family because of reported incidents of, or concerns about, domestic violence or the safety or well-being of the children involved.

Pertinent records may include:

- police reports;
- child abuse/child protection reports;
- court files in the present case and any relevant prior civil or criminal cases involving either party;
- medical, mental health, and dental records; and
- school records.

In all cases, the relevant questions are:

- Have there been incidents of physical violence or other forms of abuse perpetrated by one parent against the other?
- What impact has the violence or abuse had on the parties and their parenting?
- What impact has the violence or abuse had on each of the children?
- What does the abusive parent's past behavior indicate about his or her future propensity to undermine the other parent's authority or damage that parent's relationship with the children?

34 The custody evaluator who is unaware of the frequency with which abusers seek custody as a means to continue their control over the abused parent may inappropriately assume that an abusive parent is instead seeking custody because he or she is caring and concerned. See JAFFE, LEMON, & POISSON, *supra* note 15, at 32 (discussing how the family court can be exploited by the perpetrator of domestic violence as a means of continuing their abusive behavior).

35 See BANCROFT & SILVERMAN, *supra* note 16.

36 See e.g., Cris M. Sullivan et al., *Beyond Searching for Deficits: Evidence that Physically and Emotionally Abused Women Are Nurturing Parents*, 2 J. EMOTIONAL ABUSE 51-71 (2000) (finding that assailants' abuse of mothers had more of a direct impact on children's behavioral adjustment, highlighting the need to focus on mothers' strengths and assets).

37 Clare Dalton, Judge Susan Carbon & Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11, 20 (2003).

- What risks will continued exposure to the abusive parent pose to the children or abused parent?

The important questions raised by requests for parties to provide the evaluator access to privileged information are dealt with infra, in the context of the obligations of the parties. We also discuss the value of and risks associated with psychological testing for custody and visitation determinations.

The Role of Psychological Testing

In the rare case in which it is a relevant and necessary aspect of an evaluation, you may decide, or the expert may determine, that psychological testing would provide a helpful supplement to the information obtained through interviews and examination of the written record. This is an area to approach with caution.³⁸ If psychological tests are used, the test(s) should be administered and interpreted by a psychologist who has expertise in the use of psychological testing in the context of contested child custody cases with allegations or evidence of domestic violence. Generally, however, psychological testing is not appropriate in domestic violence situations. Such testing may misdiagnose the non-abusive parent's normal response to the abuse or violence as demonstrating mental illness,³⁹ effectively shifting the focus away from the assaultive and coercive behaviors of the abusive parent.

The relevant questions to ask are the following:

- What is the test being used to measure?
- How is the test relevant to issues of custody and visitation?⁴⁰
- Is the test valid for the purposes for which it is being used, and is the expense justifiable given the test's limitations?
- Is the test recognized and accepted by experts in the field?
- What are the qualifications necessary to use the instrument?
- Does the expert have those qualifications?

In determining the relevance and reliability of psychological testing, consider the following:

- Research literature indicates that "there are no psychological tests that have been validated to assess parenting directly."⁴¹
- No psychological test can determine whether or not a person has been an abuser or abused.⁴² There is no single profile of a victim or a perpetrator of abuse.
- The more tailored tests, developed in the past decade to address the questions most relevant in the custody context, such as the Bricklin Perceptual Scales (BPS), Perception of Relationships Test (PORT), Ackerman-Schoendorf Scales for Parent Evaluation of Custody Test (ASPECT) and Parent Awareness Skills Survey (PASS) tests, have not been

38 See Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgement*, 36 FAM. L.Q. 135 (2002) (stating that "[a]s a matter of law and as a matter of science, a test should be both relevant and reliable before its use is sanctioned in a particular setting").

39 See Nancy S. Erickson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?*, 39 FAM. L.Q. 87 (Spring 2005). The author emphasizes the need for child custody evaluators who use the MMPI-2 psychological test to consider the context of the individual's history and current situation in their clinical interpretations. Such context includes a person's age, intelligence, social or ethnic class, educational level, health status, medication influences, prior life traumas, and current situational difficulties (p. 94, citing ALAN F. FRIEDMAN ET AL., *PSYCHOLOGICAL ASSESSMENT WITH THE MMPI-2* (2001)). If taken out of context, the MMPI scores of battered women could lead mental health evaluators to misdiagnose them as severely mentally ill, even though they may actually be suffering from the trauma of the violence (p.102).

40 See, Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Child Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 204 (2005) (stating that "there is no evidence in the empirical literature that current interview protocols, traditional psychological tests, or custody-specific tests are in any way able to reliably predict child adjustment to different access plans...").

41 Shuman, *supra* note 38, at 144 (citing Vivienne Roseby, *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29, FAM. L.Q. 97, 105 (1995)).

42 See e.g., Aldarondo & Mederos, *supra* note 12, at 2-11 (stating that it is impossible to diagnose battering in the same manner that one diagnoses medical conditions such as cancer and anxiety disorders; expounding further that a determination as to whether someone is a batterer is not a clinical decision, but rather "a determination based on reviewing information provided by collateral sources, the alleged abuser, and victims"). Because psychological testing cannot identify an abusive parent, such testing may instead allow an abusive parent to use the absence of domestic violence findings in the test results to argue that the test proved that the abuse did not take place.

evaluated with enough rigor to establish their validity or reliability. These tests do not provide answers. At best, they raise hypotheses in the mind of the evaluator to be validated or invalidated in subsequent explorations.⁴³

- The standard psychological tests measuring personality, psychopathology, intelligence or achievement, including the Minnesota Multiphasic Personality Inventory (MMPI-2), Million Clinical Multiaxial Inventory (MCMI-III), Personality Assessment Inventory (PAI), Rorschach Inkblot Test, Children's Apperception Test (CAT), Thematic Apperception Test (TAT), Wechsler Adult Intelligence Scale (WAIS-III), and Wide Range Achievement Test (WRAT-3), do not directly address the psycho-legal issues relevant to most children, or parents' child-rearing attitudes and capacities.⁴⁴ In a particular case, a standard test may offer information that is related to parent-child interactions, parent functioning or child functioning; but that information should be included in the evaluation *only if* the examiner makes clear the connection between the test results and the issue that is legally relevant in the custody context, and *only if* the test results are empirically supported and integrated with other data about real-life behavior.⁴⁵
- Some of these standard tests may also measure and confuse psychological distress or dysfunction induced by exposure to domestic violence with personality disorder or psychopathology. While there may be cases in which trauma induced by abuse has a negative impact on parenting in the short term, it is critically important not to attach a damaging label prematurely to a parent whose functioning may improve dramatically once she or he is safe, the acute stress has been alleviated, and the trauma treated.⁴⁶
- Specific tests to assess for trauma (Trauma Symptom Inventory (TSI), Draw-a-Person Test (DAP) and others) may be helpful in determining treatment goals and facilitating the healing process of the victim parent and children, but they are not appropriate to determine whether traumatic incident(s) occurred.

Communicate Expectations about Information-Gathering Procedures and Safe Practices

In cases of known or suspected domestic violence, the information-gathering procedures identified on Card IIA, Side 1, can protect the abused parent and children from additional harm and increase the integrity of the information obtained. Adults or children who have experienced or been exposed to violence are unlikely to talk openly about it if they are fearful that the perpetrator will have opportunities for retaliation,⁴⁷ or if they are too ashamed to disclose the violence or abuse.

With care, the evaluator will be able to shield the parties from any contact or unsafe communication with one another during the evaluation process. In many cases, the evaluator will also be able to seek corroboration of negative information disclosed by one party about the other without disclosing the source of that information. It is important, however, to ensure that the parties understand the lack of confidentiality in the evaluation process.

43 Shuman, *supra* note 36, at 144-154.

44 See Jonathan W. Gould & Hon. Lisa C. Bell, *Forensic Methods and Procedures Applied to Child Custody Evaluations: What Judges Need to Know in Determining a Competent Forensic Work Product*, 51 JUV. & FAM. CT. J. 21, 24 (2000) (stating that no personality test directly measures parenting or parenting competencies. The authors also recommend the use of traditional psychological tests only when specific problems or issues that these tests are designed to measure are relevant to the cases, citing GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (2d ed. 1997)).

45 See Gould & Bell, *id.* See also Jonathan W. Gould & David A. Martindale, *A Second Call for Clinical Humility and Judicial Vigilance: Comments on Tippins and Wittmann*, 43 FAM. CT. REV. 253 (2005) (stating that psychological assessment tools are often not valid for custody evaluation, are often not empirically derived, and are "often more educated guesses than truth"—cautioning that mental health professionals need to be careful in presenting their data and opinions so as not to mislead the court).

46 See AM. PSYCHOL. ASS'N, *supra* note 2, at 100 (1994) (cautioning that psychological evaluators who are not trained in domestic violence may ignore or minimize the violence and attach inappropriate pathological labels to women's responses to chronic victimization); see also Erickson, *supra* note 39.

47 See Logan, *supra* note 4, at 734-735 (citing a study, which found that abused women were more likely than non-abused women to report that the abuser may impact their ability to communicate openly during the court process because of possible future harm).

Alternative available corroboration strategies for information gathering include:

- seeking corroboration from third-party sources, where available; and
- inviting the other party to give an open-ended account of a particular incident and asking follow-up questions, without revealing details shared by the first party.



If it becomes clear that information must be disclosed that may put one of the parties at risk, the evaluator should alert that party to the disclosure in advance, so that he or she may take whatever safety precautions are warranted and available. Evaluators may need to provide the abused party with information on safety planning, or assist in developing a safety plan—which may include referring the abused party to a domestic violence program or shelter.⁴⁸

Special considerations apply to interviews of children and the use of information obtained from them. First, interview strategies should be non-suggestive and appropriate to the age and developmental stage of the child. Second, the evaluator must build into his or her report the understanding that, while children may provide accurate information, their answers may also involve misinterpretations (or developmentally appropriate but immature interpretations) of events, statements or dynamics, or be influenced by input from one or both parents. From a safety perspective, it is also critical that the evaluator not attribute direct quotes to children, in order to reduce the risk that a parent will use the children's words against them or against the other parent.

An evaluator who does not respect the safety-driven procedures listed on the cards accompanying these materials is not qualified to conduct an evaluation in a domestic violence case. An evaluation that has been conducted without following those procedures will not yield reliable information or opinions and may be dangerous.

Define the Obligations of the Participants

The Obligations of the Parties

By stressing the need for the parties to assist the evaluator in accessing relevant information, we do not mean to discount the sensitivity of the decision whether or not to waive a privilege attaching to information that might be obtained from a collateral source, or might be gleaned from a written record. It is the responsibility of the parties' attorneys, if they are represented, and of the evaluator, particularly if they are not represented, to ensure that the parties fully understand the implications of both choosing and declining to waive a privilege, and are able to make an informed decision. It may also be important to determine whether a parent can waive the privilege attaching to a child's relationship with a therapist; in some jurisdictions, only the child's own representative or the therapist can take that step.⁴⁹ Verbal or written information given to the parties should be in their language, or the parties' attorneys or the evaluator should ensure the availability of a translator or a determination of literacy.⁵⁰



Any party who fears that disclosure of information will place him or her at risk of retaliation or who believes that vital privacy interests may be compromised by the investigation should be able to inform the court of his or her concerns *before* communicating the information.

⁴⁸ For more information on safety plans, see National Coalition Against Domestic Violence, *Protect Yourself*, at http://www.ncadv.org/protectyourself/SafetyPlan_130.html (last visited Dec. 6, 2005). See also Barbara J. Hart, *Personalized Safety Plan* (1992), at <http://www.mincava.umn.edu/documents/hart/hart.html#id2305464> (last visited Dec. 6, 2005).

⁴⁹ See e.g., *Hughes v. Schatzberg*, 872 So.2d 996 (Fla. App. 4 Dist., 2004) (holding that mother did not have standing to assert the patient-psychotherapist privilege on behalf of the child where she is involved in litigation over the child's welfare); *McCormack v. Board of Education*, 158 Md.App. 292, 857 A.2d 159 (2004) (holding that the trial court should have determined whether there was a conflict of interest between parents and child before ruling that parents could neither assert nor waive child's psychotherapist-patient privilege).

⁵⁰ See Deëana Jang, *Linguistic Accessibility and Cultural Competency Issues Affecting Battered Women of Color in Family Court*, SYNERGY (NCJFJC, Reno, NV), Summer 1999, at 4 (stating that "[t]he experiences, frustrations, and concerns of battered women of color cannot be discounted or trivialized by assuming the justice system addresses their needs without further consideration of their linguistic or cultural characteristics").

The Obligations of the Evaluator

In regard to the obligations identified on Card IIA, side 2 (fourth bullet), the question of when, if ever, it would be appropriate for a mental health professional to enter a therapeutic, counseling, or other professional relationship with a party or a child, subsequent to providing a custody evaluation in a case involving those individuals, is a vexed one. Because no custody case is truly “closed,” at least until the children reach the age of majority, and because the evaluator may be asked to return to court to assist in subsequent proceedings, the safest course of action is for the evaluator to avoid any subsequent professional contact, along with the conflict of interest it inevitably creates. If, in a small community, that guideline is too restrictive, then it may be appropriate to adopt a less restrictive but clear “waiting period” to discourage the creation of conflict at least during the period when re-litigation is most likely.

Court Initiative

We also recommend that, at the time of appointment of the evaluator, the court take the initiative when possible in ordering any records available to the court, such as criminal records, court activity records and child abuse/child protection reports. All these steps will facilitate the evaluation process and prevent the delays that follow when the evaluator and/or the parties are forced to return to court to clarify the terms of the appointment.

Reading the Report

Safety First

Consistent with the emphasis on safety throughout these materials, we suggest that the judge, once the evaluator's report is admitted into evidence, make an immediate determination whether the report identifies risks that should be promptly addressed, or whether disclosure of the report to the parties may create risks that should be promptly guarded against. The responses suggested on Card III are meant to be illustrative only; there may be additional steps available to you depending on the rules governing your court.

Determine Whether to Admit the Report into Evidence

Unless admissibility is stipulated by counsel for each party, the Court must subject both the evaluation report and the expert testimony derived from the evaluation to critical scrutiny, assessing carefully the validity and reliability of each before determining whether they are admissible as evidence.⁵¹

Parental Alienation and the *Daubert* Standard: on Syndromes and Behaviors

In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from "parental alienation syndrome" or "PAS".⁵² Under relevant evidentiary standards, the court should not accept this testimony.

The theory positing the existence of "PAS" has been discredited by the scientific community.⁵³ In *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court ruled that even expert testimony based in the "soft sciences" must meet the standard set in the *Daubert*⁵⁴ case. *Daubert*, in which the Court re-examined the standard it had earlier articulated in the *Frye*⁵⁵ case, requires application of a multi-factor test, including peer review, publication, testability, rate of error, and general acceptance. "Parental Alienation Syndrome" does not pass this test. Any testimony that a party to a custody case suffers from the syndrome or "parental alienation" should therefore be ruled inadmissible and/or stricken from the evaluation report under both the standard established in *Daubert* and the earlier *Frye* standard.⁵⁶

The discredited "diagnosis" of "PAS" (or allegation of "parental alienation"), quite apart from its scientific invalidity, inappropriately asks the court to assume that the children's behaviors and attitudes toward the parent who claims to be "alienated" have no grounding in reality. It also diverts attention away from the behaviors of the abusive parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways toward the children themselves, or the children's other parent. The task for the court is to distinguish between situations in which children are critical of one parent because they have been inappropriately manipulated by the other (taking care not to rely solely on subtle indications), and situations in which children have their own legitimate grounds for criticism or fear of a parent, which will likely be the case when that parent has perpetrated domestic violence. Those grounds do not

51 See e.g., Shuman, *supra* note 38, at 150, 160 (asking "How can the law be a critical consumer of mental health practitioner expertise if it ignores the scientific community's critiques of proffered expert testimony and fails to apply discriminating threshold standards of admissibility of expert evidence derived from these tests?"; further arguing that qualifications alone do not provide any guarantees that expert opinions are based on reliable methods and procedures).

52 "Parental alienation syndrome" was introduced by Richard Gardner and was primarily associated with child sexual abuse allegations in the context of contested child custody cases. For more information, see Bruch, *supra* note 28.

53 According to the American Psychological Association, "... there are no data to support the phenomenon called parental alienation syndrome ..." AM. PSYCHOL. ASS'N., *supra* note 2, at 40.

54 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

55 *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

56 These are federal standards, but many states adhere to them at least generally and should still exclude any proffered evidence of "PAS".

become less legitimate because the abused parent shares them, and seeks to advocate for the children by voicing their concerns.

Cases known or suspected to involve domestic violence pose particular challenges because:

- It is appropriate for parents to try to protect themselves or their children from exposure to violence, even when it means limiting the other parent's contact with the children;⁵⁷
- Abusive partners commonly sabotage their respective partner's parental authority over, and relationship with, the children;⁵⁸
- Abusive parents rarely take responsibility for the consequences of their behaviors, but instead blame their partners for turning the children against them;⁵⁹ and
- Children in abusive households may feel safer identifying with the abusive and more powerful parent.⁶⁰

If the history of violence is ignored as the context for the abused parent's behavior in a custody evaluation, she or he may appear antagonistic, unhelpful, or mentally unstable.⁶¹ Evaluators may then wrongly determine that the parent is not fostering a positive relationship with the abusive parent and inappropriately suggest giving the abusive parent custody or unsupervised visitation in spite of the history of violence; this is especially true if the evaluator minimizes the impact on children of violence against a parent or pathologizes the abused parent's responses to the violence.⁶²

Custody evaluators, therefore, should be advised to listen carefully to children's concerns about each of their parents, and follow up with a careful investigation as to whether those concerns are grounded in fact, what role each parent has played in shaping the children's perceptions of the other parent, and each parent's apparent motivation. This careful fact-based inquiry, unlike applying the "PAS" label, is likely to yield testimony that is more accurate and relevant.

Read the Report Critically

The checklist provided on Card III offers a recap of much of the material included on Cards I and II, offering you a final opportunity to assess how well the evaluation has been performed, and the extent to which you can feel comfortable relying on its conclusions.⁶³

One common flaw in reports prepared by custody evaluators that deserves special mention is **"confirmatory bias."** It appears when the evaluator develops a hypothesis—forms an opinion about some issue in the case—early in his or her process, finds data to support it, confirms the hypothesis, and then stops testing it against new or different data that might undermine the hypothesis or effect a change of mind.

As the judge, you can test for the presence of this "confirmatory bias" by:

- looking at the extent to which the evaluator has made use of collateral sources and available documentation to corroborate important findings of fact on which his or her conclusions and recommendations are based;
- looking at whether the evaluator has made available to you all the relevant data gleaned in the course of the inquiry: both the data that support the evaluator's conclusions and recommendations, *and* the data that might have led to competing conclusions or recommendations. If the report seems suspiciously one-sided, you might conclude that

⁵⁷ See Drozd & Olesen, *supra* note 29.

⁵⁸ See BANCROFT & SILVERMAN, *supra* note 16, at 57-64.

⁵⁹ See *id.* at 29-53.

⁶⁰ See Dalton, Carbon & Olesen, *supra* note 37.

⁶¹ Am. Psychol. Ass'n, *Issues and Dilemmas in Family Violence: Issue 5*, at <http://www.apa.org/pi/pii/issues/issue5.html> (last visited Dec. 6, 2005).

⁶² *Id.*


⁶³ See Shuman, *supra* note 38, at 19 ("relying on experts without testing the reliability of their methods and procedures cloaks experts' value judgments under the veil of science and risks that their personal and professional characteristics bias the evaluation and the importance of information learned", citing Robert Henley Woody, *Behavioral Science Criteria in Child Custody Determinations*, 3 J. FAM. & MARRIAGE COUNS. 11 (1977)).

the evaluator has left out data that did not support his or her conclusions and recommendations;

- looking at whether the evaluator has identified areas where he or she has been unable to obtain information or to reconcile or choose between competing accounts; and
- looking at whether the evaluator appears to use myths or stereotypes regarding domestic violence, such as assuming that an angry mistrustful parent is most likely making a false allegation to gain leverage in the custody case or assuming that a child would not be happy to see the abusive parent at a supervised or unsupervised visitation.

Assess the Recommendations

A final test of the evaluator's expertise is whether his or her recommendations take into account the need to protect the physical and emotional safety of the abused parent and children involved in the case, and whether the recommendations offered make full use of the range of alternatives available in the case, such as:

- granting sole physical and legal custody to the abused parent;
-  postponing visitation until the abused parent and the children have had an opportunity to establish their safety and heal from any trauma associated with violence or abuse;⁶⁴
- postponing visitation until the violent or abusive parent has successfully completed appropriate treatment, including a batterers intervention program. If your jurisdiction provides guidelines and certification for programs, use only sanctioned programs. Anger management, pastoral counseling, couples counseling,⁶⁵ and parenting programs are not appropriate forms of intervention in cases with domestic violence and can heighten danger for the abused parent and/or children. It is also important to understand that completing a batterers intervention program does not guarantee that the abusive parent will change his or her behavior;⁶⁶
- allowing relocation to a confidential address (or, if that has already occurred, making sure that the address is kept confidential from the violent or abusive parent);
- restraining the violent or abusive parent's communication with or proximity to the other parent;
- restraining the violent or abusive parent's communication with or proximity to the children, except in the context of authorized visitation;
- structuring visitation with specific levels of restriction as seems appropriate:
 - ♦ visits in a formally structured supervised setting;
 - ♦ visits informally supervised by appropriate family members—provided the court establishes clear guidelines to be followed during visitation related to the supervisor's responsibilities and his or her authority during supervision, and provided both parents have consented to the choice of supervisor;
 - ♦ denial of overnight visits;
 - ♦ visits limited as to duration (with gradual increases in time allotted if safe to do so) and limited to a specific location or locations;
 - ♦ restrictions on the presence of specific persons other than the parent while the parent is with the children;
 - ♦ prohibition of the violent or abusive parent's use of alcohol or drugs during or within a specified time period prior to visits;
 - ♦ any other conditions that are deemed necessary to provide for the safety of the child, the abused parent, or other family or household members;

64 Jaffe, Crooks & Poisson, *supra* note 2, at 61 (finding in their study that time appeared to be a healing factor for children when it was associated with an end to the violence; stating that "the longer the children had gone without seeing their [abusive] father, the greater the improvement in their overall adjustment").

65 See Aldarondo & Mederos, *supra* note 12, at 2-13 (stating that traditional couples counseling does not address well the issues of oppression, coercion, and violence in intimate relationships; and that there are no studies that have explored the safety of women when couples counseling is used in domestic violence cases).

66 See "easing visitation restrictions" in this list, *infra*. Also, for more information about program effectiveness, see Etiony Aldarondo, *Evaluating the Efficacy of Interventions with Men Who Batter*, in PROGRAMS FOR MEN WHO BATTER (Etiony Aldarondo & Fernando Mederos eds., 2002), *supra* note 12, at 3-1; and see EDWARD GONDOLF, BATTERER INTERVENTION SYSTEMS: ISSUES, OUTCOMES, AND RECOMMENDATIONS (2002).

- easing visitation restrictions over time if the violent or abusive parent has remained in strict compliance with the court orders and/or treatment plans, provided that parent has shown observable and measurable improvements regarding domestic violence and parenting, and provided that safety concerns for both the children and the abused parent have realistically decreased;⁶⁷
- exchanging children through an intermediary, or in a protected setting; and/or
- securing each child's passport and requiring a violent or abusive parent to post a bond to secure the return of children after a visit, or to secure any other performance on which visitation is conditioned.⁶⁸

Finally, there will be occasional cases where the only way to serve the children's best interests will be to deny the violent or abusive parent any future contact with the children because it seems that less restrictive alternatives will not secure their safety or that of the other parent.

⁶⁷ See Peter Jaffe, Claire Crooks & Hon. Frances Wong, *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interests*, 6 J. CTR. FOR FAM., CHILD. & CT. 95 (2005) (addressing the role of the family court and its court-related services in determining parental contact following allegations of domestic violence).

⁶⁸ This list draws heavily on the list of "appropriate measures" contained in § 2.11(2) in AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTIONS: ANALYSIS AND RECOMMENDATIONS (2002) and § 405 in MODEL CODE, *supra* note 18. See also, AM. PSYCHOL. ASS'N, *supra* note 2, at 99 ("In a matter of custody, preference should be given to the nonviolent parent whenever possible, and unsupervised visitation should not be granted to the perpetrator until an offender-specific treatment program is successfully completed, or the offender proves that he is no longer a threat to the physical and emotional safety of the child and the other parent. Visitation should be supervised by an appropriate neutral party who will advocate for the child.").



Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

Additional Resources

Reading Material

Books

AM. PSYCHOL. ASSOC'N (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001). *DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY*. Washington, DC: Am. Psychol. Assoc'n.

MARY M. LOVIK (3rd ed. 2004). *DOMESTIC VIOLENCE BENCHMARK: A GUIDE TO CIVIL AND CRIMINAL PROCEEDINGS*. Lansing, MI: Mich. Jud. Inst.

JAMES PTACEK (1999). *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES*. Boston: Northeastern U. Press.

MARIA D. RAMOS & MICHAEL W. RUNNER (1999). *CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDGES BENCH BOOK*. San Francisco: Fam. Violence Prevention Fund.

MICHAEL RUNNER & SUJATA WARRIOR (2001). *CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDICIAL EDUCATION CURRICULUM*. San Francisco: Fam. Violence Prevention Fund.

NEIL WEBSDALE (1999). *UNDERSTANDING DOMESTIC HOMICIDE*. Boston: Northeastern U. Press.

Articles

Am. Judges Assoc'n, *Domestic Violence & The Courtroom Understanding The Problem... Knowing The Victim*, available at http://aja.ncsc.dni.us/domviol/publications_domviobooklet.htm (last visited Dec. 6, 2005).

Assoc'n of Fam. & Conciliation Cts., *Model Standards of Practice for Child Custody Evaluations*, available at http://www.afccnet.org/pdfs/Child_Model_Standards.pdf (last visited Dec. 6, 2005).

Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265 (2002).

Janet M. Bowermaster, "Relocation Restrictions: An Opportunity for Custody Abuse", 4 *Synergy* 4 (Winter 1999/2000).

Comm'n on Domestic Violence, Am. Bar Assoc'n, *Tool for Attorneys to Screen for Domestic Violence*, available at <http://www.abanet.org/domviol/screening%20tool%20final%20version%20sept.%202005.pdf> (last visited Dec. 6, 2005).

Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273 (July 1999) [Journal is now called *Family Court Review*].



Stephen E. Doyne et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50 JUV. & FAM. CT. J. 1 (1999).

Jeffrey L. Edleson, Lyungai F. Mbilinyi & Sudha Shetty, *Parenting in the Context of Domestic Violence* (March 2003), at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/fullReport.pdf> (last visited Dec. 6, 2005).

Andrea C. Farney & Roberta L. Valente, *Creating Justice through Balance: Integrating Domestic Violence Law into Family Court Practice*, 54 JUV. & FAM. CT. J. 35 (2003).

Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence after the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101 (2004).

Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 AM. U.J. GENDER SOC. POL'Y & L. 657 (2003).

Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with "Outside Neutrals"*, 42 JUDGES' J. 10 (Winter 2003).

Maureen Sheeran & Scott Hampton, *Supervised Visitation in Cases of Domestic Violence*, 50 JUV. & FAM. CT. J. 13 (1999).

Links to Organizations

American Bar Association (ABA),

<http://www.abanet.org>, seeks to provide attorneys and judges with the knowledge and tools needed to assist them in their legal profession. The ABA has several programs targeted to specialized areas of interest, which are highlighted below.

Center on Children and the Law,

<http://www.abanet.org/child/home2.html>, provides technical assistance, training, and research that "[address] a broad spectrum of law and court-related topics affecting children. These topics include child abuse and neglect, custody and support, guardianship, and children's exposure to domestic violence."

Child Custody Pro Bono Project,

<http://www.abanet.org/legalservices/probono/childcustody.html>, is a joint project of the ABA Standing Committee on Pro Bono and Public Service and Family Law Section and seeks to "enhance[] and expand[] the delivery of legal services to poor and low income children involved in divorce, adoption, guardianship, unmarried parent, and protective order matters." The Child Custody Pro Bono Project identifies and develops "best practices", training, and technical assistance for courts and pro bono programs, and is a national resource in the area of child custody.

**Commission on Domestic Violence,**

<http://www.abanet.org/domviol/home.html>, works “to mobilize the legal profession to provide access to justice and safety for victims of domestic violence.” The Commission produces publications that assist professionals in the field, including the newest edition of *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK*, 2ND ED. (2004).

Family Law Section,

<http://www.abanet.org/family/home.html>, has a mission “to [s]erve as the National Leader in the Field of Marital and Family Law.” Among its stated goals is to improve the public and professional understanding about marital and family law issues and practitioners.

American Judges Association (AJA),

<http://aja.ncsc.dni.us/domviol/page1.html>, seeks to improve “the effective and impartial administration of justice, to enhance the independence and status of the judiciary, to provide for continuing education of its members, and to promote the interchange of ideas of a judicial nature among judges, court organizations and the public.” The AJA offers publications to address domestic violence issues, including a *Special Issue on Domestic Violence*, 39 CT. REV. 4-51 (Fall 2002) and *Domestic Violence & The Courtroom: Understanding The Problem—Knowing The Victim*, both of which can be downloaded from its website.

Association of Family and Conciliation Courts (AFCC),

<http://www.afccnet.org>, is “an international and interdisciplinary association of family, court, and community professionals dedicated to constructive resolution of family disputes.” Among its stated purposes, the AFCC seeks to provide an interdisciplinary forum for the exchange of ideas and the development of procedures to assist families in conflict and to develop and improve parent education, mediation, custody evaluation, and other processes to aid families in resolving their disputes.

Battered Women’s Justice Project (BWJP),

<http://bwjp.org>, is a collaborative effort of three organizations whose mission is “to promote systemic change within community organizations and governmental agencies engaged in the civil and criminal justice response to domestic violence that creates true institutional accountability to the goal of ensuring safety for battered women and their families. To this end, BWJP undertakes projects on the local, state, national, and international levels.” BWJP, Civil Office, works with professionals on issues such as divorce and support, child custody, separation violence, mediation, and protection orders.

Center for Families, Children & the Courts (CFCC), Family Violence Project,

<http://www.courtinfo.ca.gov/programs/cfcc/programs/description/famviol.htm>, is a project of the Judicial Council of California, Administrative Office of the Courts, that focuses on how the courts and court-related professionals address issues of family violence and offers training for child custody evaluators on domestic violence in accordance with the California Rules of Court.

Family Violence Prevention Fund (FVPF),

<http://www.endabuse.org>, “works to prevent violence within the home, and in the community, to help those whose lives are devastated by violence because everyone has the right to live free of violence.” FVPF’s Judicial Education Project, in partnership with the National Council of Juvenile and Family Court Judges, conducts education seminars for judges across the country in order to enhance their skills in handling criminal and civil domestic violence cases.



Legal Resource Center on Violence Against Women (LRC),

<http://www.lrcvaw.org>, seeks “to obtain legal representation for domestic violence survivors in interstate custody cases and to provide technical assistance to domestic violence victim advocates and attorneys in such cases.” The website provides helpful information and links for survivors, advocates, and attorneys.

Minnesota Center Against Violence and Abuse (MINCAVA),

<http://www.mincava.umn.edu>, operates an electronic clearinghouse that provides research, education, and access to more than 3,000 violence-related resources on such issues as child abuse, domestic violence, dating violence, stalking, sexual violence, and elder abuse.

National American Indian Court Judges Association (NAICJA),

<http://www.naicja.org>, is “a national voluntary association of tribal court judges. Its membership is primarily judges, justices and peacemakers serving in tribal justice systems. NAICJA is a non-profit corporation established in 1969. The Association is primarily devoted to the support of American Indian and Alaska Native justice systems through education, information sharing and advocacy. The mission of the Association, as a national representative membership organization, is to strengthen and enhance tribal justice systems.”

National Association of Counsel for Children (NACC),

<http://naccchildlaw.org>, mission is “to improve the lives of children and families through legal advocacy. The NACC provides training and technical assistance to attorneys and other professionals, serves as a public information and professional referral center, and engages in public policy and legislative advocacy.”

National Association of Women Judges (NAWJ),

<http://www.nawj.org>, is dedicated “to ensuring equal justice and access to the courts for all including women, youth, the elderly, minorities, the underprivileged, and people with disabilities; providing judicial education on cutting-edge issues of importance; developing judicial leaders; increasing the number of women on the bench in order for the judiciary to more accurately reflect the role of women in a democratic society; and improving the administration of justice to provide gender-fair decisions for both male and female litigants.”

National Center for State Courts (NCSC),

<http://www.ncsconline.org>, provides “up-to-date information and hands-on assistance that helps [court leaders] better serve the public. NCSC offers solutions that enhance court operations with the latest technology; collects and interprets the latest data on court operations nationwide; and provides information on proven ‘best practices’ for improving court operations in many areas, such as civil case management.”

National Council of Juvenile and Family Court Judges (NCJFCJ),

<http://www.ncjfcj.org>, is “dedicated to serving the nation’s children and families by improving the courts of juvenile and family jurisdictions.” NCJFCJ has dedicated programs addressing family violence, child abuse and neglect, victims of juvenile offenders, alcohol and drug abuse, termination of parental rights, child support enforcement, adoption and foster care, and juvenile delinquency.

U.S. Department of Justice, Office on Violence Against Women (OVW),

<http://www.ojp.usdoj.gov/vawo>, provides on-line resources with “up-to-date information on interventions to stop violence against women for criminal justice practitioners, advocates, and social service professionals with the latest in research and domestic violence, stalking, batterer intervention programs, child custody [and] protection, sexual assault, and welfare reform.”



The Fundamental Question:

What If There Are No Resources for an Evaluation?

Is There a Need for an Emergency/Interim Assessment?

*** Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.**

Ordering an Evaluation: When Is Domestic Violence Expertise Necessary?

REMEMBER: Not every case will require or need an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented litigants with a checklist of needed information, and assessing your own ability to make safe and responsible decisions in light of both the information you have and the information you do not.

Is this a case where I need assistance in determining:

- the presence and extent of physical or sexual violence or other assaultive or coercive behaviors used by one parent against the other;
- the impact of domestic violence on the children;
- the effect of domestic violence on the parenting of each party; and
- the impact of domestic violence on decisions about how to structure custody and visitation?

(See also supplemental material, INTRODUCTION, p. 7-11.)

Many litigants are unable to afford evaluations, and many courts have limited evaluation resources. If resource constraints, or the lack of a qualified evaluator, preclude an evaluation in a particular case, this tool may still assist you:

- to identify categories of evidence that the parties' attorneys should produce;
- to outline information that unrepresented litigants need to provide to assist your decision making;
- to allocate limited evaluation resources to maximum effect; * and
- to make safe and responsible decisions even in situations where you lack complete information—there is value in knowing what you do not know.

NO, if a restraining/protection order is in place and provides needed relief, the party against whom it was issued is in compliance, and the situation is stable.

YES, if an existing restraining/protection order has been violated or is not adequate (e.g., fails to provide needed relief), or if there is no restraining/protection order in place, and you have reason to be concerned about the safety of one or both of the parties and/or their children. You may want an interim safety assessment performed by a qualified expert before issuing temporary orders to stabilize the situation pending a final resolution of the contested issues. *

FACTORS that might prompt an emergency/interim safety assessment include:

- credible allegations of child abuse, which often co-occurs with domestic violence;
- one or more convictions of domestic violence-related or other violent offenses;
- a record of one or more 911 calls;
- possession of, access to, or threats to use firearms in conjunction with evidence of assaultive or coercive behavior perpetrated by one parent against the other;
- evidence of stalking;
- evidence of harm or threats of harm to partner or children, or threats of harm to pets or property;
- evidence of suicide threats or threats of self-harm;
- evidence of threats of abduction of children;
- a history of drug or alcohol abuse;
- a prior record of restraining/protection orders involving this partner or a former partner (see also supplemental material, History of Physical Violence, p. 13, examining cases in which there may be a record against both parents);
- evidence of assaultive and coercive behaviors, even if there is no history of physical or sexual violence; and/or
- evidence of violations of prior or existing restraining/protection orders.

Is There a Need for an Emergency/ Interim Assessment? (cont.)

Once Safety Is Assessed and If Resources Are Available, Should I Order an Evaluation?

* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card I Side 2

An emergency/interim safety assessment should:

- be limited to an assessment of what measures are needed to minimize the risks to all concerned pending the resolution of the contested issues in the case;
- be conducted by a domestic violence and risk assessment expert; and
- consider, at a minimum, the advisability of the following alternatives:
 - ◆ suspending all contact between the parent whose behavior raises concerns and his or her partner and children until an interim hearing can be conducted, or pending a final resolution of the case;
 - ◆ providing for appropriately supervised visits; and/or
 - ◆ structuring the exchange of children in a safe setting with or without contact between the parents.

The answer may be **YES** when:

- the facts trigger a statutory obligation to obtain an evaluation;
- there is a documented history of physical or sexual violence, stalking, or a pattern of assaultive or coercive behaviors perpetrated by one parent against the other, but you are nonetheless inclined to permit contact with the abusive parent; and/or
- there are allegations that a parent has harmed or threatened to harm him- or herself or the other parent or the children, threatened injury to property or pets, or otherwise abused the other parent or the children.

The answer may *also* be **YES** when:

- The case has, as yet, no proven or alleged violence, but has other evidence or other allegations that raise **"RED FLAGS"** because of their common co-occurrence with domestic violence.

RED FLAGS include:

- a documented history or allegations of mental illness, substance abuse, or child abuse by either party; *
- a pattern of coercion and control even if there is no established history of physical or sexual violence;
- indications that the children are exhibiting symptoms consistent with, although not necessarily the result of, child abuse or their exposure to domestic violence. Such symptoms may include sleep disturbances, bedwetting, age-inappropriate separation anxiety, hyperactivity, aggression or other behavioral problems, depression, or anxiety; *
- the presence of one or more prior court orders restricting a parent's access to a former partner or any of his or her children in this or another relationship;
- a history of court or social services involvement with the family;
- a stipulated or mediated agreement heavily favoring one party, thereby raising concerns of intimidation or coercion, especially if one or both of the parties are unrepresented; *
- allegations that a parent is turning the children against the other parent; * and
- indications that one or both parents are inattentive to the children's needs. *

(See also Card 1, Side 1, **FACTORS**, and Card 2, Side 2, **INFORMATION**.)

And the answer may *also* be **YES** when:

- one or both parties have already retained one or more experts;
- one or both parties, or the children's lawyer or guardian *ad litem*, has requested an evaluation that raises concerns about domestic violence or raises "red flags" warranting an investigation of domestic violence; or
- a party seeking custody is also making a contested request to relocate, particularly if there is a hint that the case may involve domestic violence and safety concerns may be an underlying reason for the request. *

II

Safety First



Frame the Inquiry



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

** Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.*

Framing the Order: What Do I Need to Know, from Whom, and How Do I Ask?

REMEMBER: Not every case will require an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented litigants with a checklist of needed information, and assessing your own ability to make safe and responsible decisions in light of both the information you have and the information you do not.

Your highest priority in framing your order, and the evaluator's highest priority in conducting the inquiry, is to make sure that:

- safety concerns that emerge in the course of the inquiry are promptly addressed; and
- no one is endangered by how the information is collected or shared.

Investigation, Evaluation, Recommendation

You need information to guide your own application of the relevant legal principles and rules. Whom you choose to provide you with the information will be influenced by the type of information you need.

• Investigation: *

You need an investigation when the questions are factual.

For example:

- ♦ "What has happened in this family?"
- ♦ "What do the relevant records show?"
- ♦ "What does the child say about visiting with his mother or father?"
- ♦ "What is the history of each parent's relationship with each child?" (e.g., who fed, clothed, etc., the children?)

• Evaluation: *

You need an evaluation from a mental health professional to answer the following types of questions if they are relevant to the inquiry:

- ♦ "What is the psychological impact of parental behavior on a child?"
- ♦ "What are the personality, characteristics, functioning, or symptoms of a party or child?"
- ♦ "Are there clinical-level concerns about the mental health of one of the parents or the children?"

• Recommendations to the Court: *

Court practice is sharply divided on the question of asking evaluators or investigators to make recommendations. However, opinion is unanimous that the judges, not evaluators, make the ultimate best-interests determination. If you or your court permits or requires custody evaluators to make recommendations, in order to make sure that you can make your own independent assessment, you must be able to determine:

- ♦ whether the recommendation is sufficiently supported by relevant facts;
- ♦ the level of support for the theory and methodology relied upon by the evaluator in his or her professional community; * and
- ♦ whether the evaluator impermissibly tried to negotiate a resolution of the matter, either through counsel or directly with the parties.

(See Card III, Side 2, ASSESSING THE RECOMMENDATIONS)

Choose the Expert

Be Specific about the Information You Need

***** Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card II Side 2

Continued on Card **IIA**

It is important to choose an evaluator who has training and experience in: *

- ♦ the issues related to domestic violence and/or sexual assault, including the dangers associated with separation; *
- ♦ the link between partner abuse and child abuse;
- ♦ the impact of exposure to domestic violence on children;
- ♦ the impact of abuse on parenting; and
- ♦ the psychological, emotional, physical, and economic risks that continued exposure to the abusive parent's behavior can have on the abused parent and the children.

You will also need to match the evaluator's training and skills to the particular inquiry:

- ♦ A case with extensive documentation may require the investigatory skills of an attorney.
- ♦ Obtaining sensitive information from relatively young children may require a mental health clinician with a background in child development and child psychology and up-to-date training on appropriate interviewing techniques.
- ♦ A mental health evaluation will require specialized expertise. The same is true for clinical diagnosis, in the rare case in which such diagnosis is a relevant and necessary aspect of the evaluation.
- ♦ Inquiries dependent upon a particular cultural competence, or specialized expertise in another area, such as substance abuse, will require someone with that competence or expertise.

Although the particular areas of inquiry may differ from case to case, areas that are usually important in a case in which domestic violence has or may have occurred, and that you will want to direct the expert to inquire into, include the following:

- any facts that would trigger a statutory presumption or specific statutory obligations;
- incidents of physical violence, sexual abuse, threats, stalking, or intimidation;
- destruction of property or abuse of pets or threats to do so;
- threats of homicide, suicide, serious bodily injury, or child abduction;
- unprovoked behaviors designed to make a parent fearful for the children's safety or fearful that the children will be abducted;
- patterns of coercive or controlling behavior, including emotionally abusive behavior; inappropriately limiting access to finances, education, or employment; and isolation from friends or family;
- behaviors that appear designed to, or likely to, undermine a parent's relationship with the children or capacity to parent effectively;
- the exposure of children to incidents of physical violence, sexual abuse, threats, stalking, or intimidation; *
- the impact of all these behaviors on each parent, each child, and the relationship between each parent and each child; *
- any specific cultural context that is relevant to the inquiry;
- a parent's immigration status used as a means to maintain coercive control over that parent;
- each parent's history of meeting each child's needs;
- the current situation and needs of each child;
- the nature of the communication between the parents;
- the record of any criminal or civil legal proceeding or police involvement; and
- short- and long-term safety concerns raised by the behavior of a parent. *

(See also Card I, Side 1, **FACTORS**, and Card I, Side 2, **RED FLAGS**.)

IIA

Articulate Expected Sources of Information

Communicate Expectations about Any Information- Gathering Procedures and Safety Practices

Frame the Process

*** Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.**

Card IIA Side 1

Evaluations that are based solely on interviewing and/or observing the parties and their children are significantly less reliable. You will want to ensure that evaluators supplement basic information with:

- interviews with relevant collaterals; *
- a thorough review of all pertinent written records, assuming they are non-privileged or that any privilege attaching to them has been properly waived; * and
- in extraordinary circumstances, psychological testing—although this, as explained in the supplementary materials, must be relevant and approached with caution. *

(See Card III, Side I, READ THE REPORT CRITICALLY)

Evaluators must make the information-gathering process safe for all concerned, to avoid putting the parties or their children at risk or compromising the reliability of the information obtained. *

Evaluators should:

- make initial contact with each party separately;
- reflect the safety needs of each family member in any guidelines for further contacts with both the adult parties and the children;
- respect the terms of existing restraining/protection orders;
- help unrepresented litigants understand the evaluation process, the risks of disclosing information that may be shared with the other party, and the risks of not disclosing information;
- advise the parties of an evaluator's duty to report suspected child abuse;
- whenever possible avoid identifying one party as the source of negative information about the other;
- warn the party at risk about disclosure of information in advance, if it becomes essential to share information with one party that may put the other at risk; *
- avoid attributing direct quotes to children; and
- use specialized techniques and understanding to obtain and interpret information from children. *

We propose that your order for a custody evaluation specifically include:

- the timeline with which you expect the evaluator and the parties or their attorneys to comply;
- the respective obligations of the parties, their attorneys, and the evaluator with respect to the completion of the evaluation;
- upon notice and opportunity to be heard, an order to produce records available to the courts but not directly available to the parties or their attorneys, including;
 - ♦ child protective services reports; and
 - ♦ criminal or court activity records;
- the assignment of costs of the evaluation and the costs of the parties' participation in the evaluation;
- the scope and purpose of the evaluation or investigation (you may want to invite input into the scope and purpose of the evaluation or investigation from the parties and their attorneys); and
- the specific questions you want answered in order to expedite the inquiry, to enhance the parties' safety and court efficiency, and to inform your decisions.

Define the Obligations of the Parties



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

** Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.*

Card IIA Side 2

To facilitate the evaluation and increase the utility of the final product, articulate clearly the obligations of the parties, their attorneys, and the evaluator:

A. The parties shall:

- provide information as requested and appropriate;
- sign requested consents or waivers after full consideration, and upon advice of counsel if represented, of the implications and advisability of waiving any privilege involved (make sure the parties have access to information in their language or to qualified translators, or that proper attention is given to a party's literacy); *
- make themselves available to the evaluator; and
- provide the evaluator with access to their children.

B. The attorneys shall:

- participate in defining the proposed scope and purpose of the evaluation or investigation;
- assist their clients in fulfilling their responsibilities, ensuring that they understand what information is being sought and from which sources;
- provide information and documentary material to the evaluator in an organized and timely fashion as authorized by their client or as directed by the court; and
- advise their clients about what information may be disclosed to the other party and what information may otherwise be placed in the public record of the case.

C. The evaluator shall:

- ✎ make the safety of the parties and their children a priority at every stage of the process;
- accept the appointment only if qualified;
- accept the appointment only if unaffected by any conflict of interest;
- refrain from engaging in any conflicting professional relationship with anyone involved in the case after accepting the appointment; *
- follow the terms of his or her licensure and any appropriate professional guidelines and standards;
- conduct the inquiry giving full consideration to the claims and concerns of each party;
- conduct the inquiry in a timely fashion;
- avoid creating situations that may violate the provisions of a restraining/protection order;
- with the permission of the court, draw on any necessary specialized resources; and
- refrain from negotiating a resolution of the matter, unless specifically instructed to do so by the court and with the knowledge of the parties and their attorneys.



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Safety First



Determine Whether to Admit the Report into Evidence

Read the Report Critically

(Note: The factors listed in this section could be used to determine the admissibility requirements under your state's rules of evidence.)



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

★ Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card III Side 1

Reading the Report

- Does the content of the report raise immediate concerns about the existing safety of the parties or their children?
- Does the fact that each party will be given access to the report raise additional safety concerns that should be addressed before the report is shared?

Apart from the task of framing final orders, immediate safety concerns may require you:

- to schedule a hearing pursuant to your state's laws and issue a restraining/protection order, or make a referral for safety planning or other needed services; or
- to involve child protective services in accordance with your state's reporting laws if you conclude from the report that a child is at imminent specific risk of physical or emotional harm.

It is important to remember that custody evaluation reports are a form of evidence, either written or oral, which requires an admissibility determination. Check your state's rules of evidence. See also the Federal Rules of Evidence (FRE): **FRE 401 and 402 (relevance), FRE 403 (probative value), and FRE 702 (experts).** (See supplemental material, **PARENT ALIENATION AND THE DAUBERT STANDARD**, p. 24.)

From the report, you should be able to determine whether the evaluator:

- **responded to each area of inquiry** detailed in your appointment order;
- **provided you with sufficient information to make a determination on the operative legal principles present in the case;**
- **described instances** where a child has directly witnessed, been exposed to, or been affected by incidents of domestic violence perpetrated by one party against the other;
- **explained the context of the evaluation**—i.e., at what point in the couple's separation process the evaluation took place and the possible impact of that timing on the findings and recommendations; and
- **properly reflected the limited scope of the task** assigned in cases where his or her function is one of investigation rather than evaluation.

To assess the weight to give to the report, you will need to determine whether the report contains sufficient information for you:

- **to rule on potential evidentiary concerns raised by the report:**
 - ◆ Was the information obtained directly from individuals interviewed, documents examined, or observations made by the evaluator? Is the source of each piece of information identified?
 - ◆ Is any information vulnerable to challenge because it was obtained "second-hand"? If so, is that indicated in the report?
 - ◆ Is the information in the report relevant to the legal issues raised by the case?
- **to assess the thoroughness of the factual investigation: ★**
 - ◆ Have relevant collateral sources been interviewed?
 - ◆ Have relevant written records been reviewed?
 - ◆ Have important facts been corroborated?
- **to assess the accuracy of information from the parties and their children:**
 - 👤 Have the safety needs of each member of the family been recognized?
 - ◆ Has the evaluator avoided creating opportunities for intimidation and coercion?

Read the Report Critically (cont.)

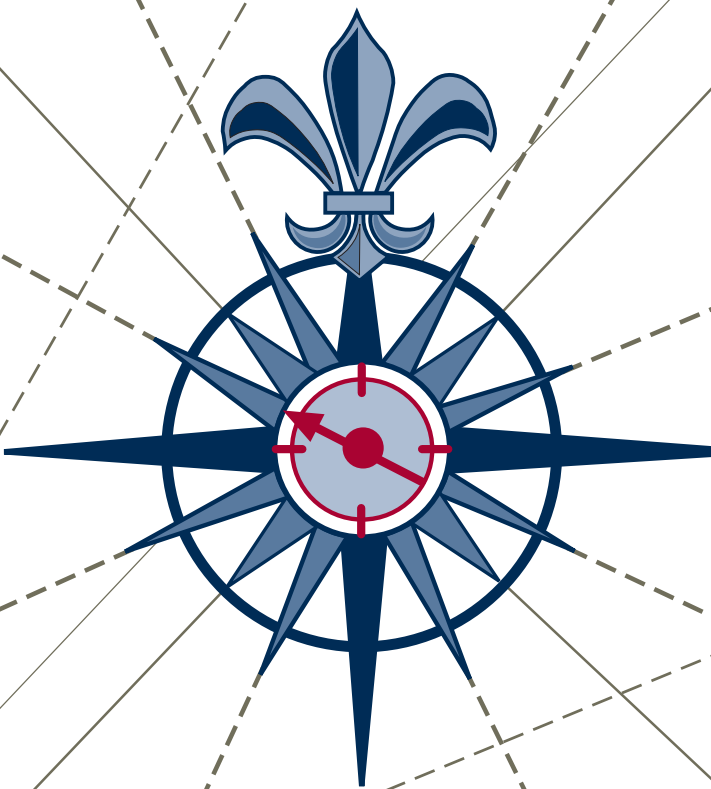
- **to determine whether the factual investigation has been even-handed:**
 - ♦ Can you determine if fair consideration was given to the claims and concerns of each of the parties, including giving each the opportunity to respond to allegations made by the other?
 - ♦ Does the report assess the strengths and deficiencies or vulnerabilities of each parent and each parent/child relationship?
 - ♦ Does the report consider the particular cultural context of the parties' parenting and the relationship between the parties and their children?
 - ♦ Has the evaluator explored all possible interpretations of the information?
- **to identify what information was not available, and why:**
 - ♦ Does the report allow you to determine the extent to which missing information limits the value of the evaluator's conclusions or recommendations?
- **to determine, in cases where the evaluator has conducted an investigation and analyzed, interpreted, or drawn conclusions from the data:**
 - ♦ that the evaluator has fully reported the underlying data, with each source identified and relevant documents or records attached?
 - ♦ that the evaluator has clearly distinguished between the facts and the analysis, interpretation, or conclusions he or she is deriving from them?
 - ♦ that the underlying data support the analyses, interpretations, or conclusions from which they are drawn?
- **to determine, in cases where an evaluator employs specialized mental health expertise:**
 - ♦ that the evaluator has the appropriate training, qualifications, and experience to employ any specialized data-gathering procedures used?
 - ♦ that any psychological tests administered offer relevant information and that the evaluator satisfactorily explained their relevance?
 - ♦ that the tests employed have received appropriate professional endorsement for use in this context (understanding that psychological testing is generally not appropriate in domestic violence situations)?
 - ♦ that the evaluator has the requisite mental health expertise to analyze, interpret and draw conclusions from the available data?

(For more information on reading the report critically, see the supplemental information regarding confirmatory bias, page 25; see also Card IIA, Side 1, SOURCES OF INFORMATION, and corresponding supplemental material, page 19-21.)

If domestic violence is identified as an issue, you will need to determine whether a qualified evaluator: ★

- ✎ demonstrated an understanding of the ongoing safety risks;
- offered recommendations that provide the security needed to allow healing from any existing trauma associated with abuse or exposure to abuse;
- considered the full range of protective options, including:
 - ♦ supporting relocation of the vulnerable party and the children to a secure location;
 - ♦ otherwise shielding the vulnerable party from contact with or direct communication from the abusive party;
 - ♦ placing total or partial, permanent or provisional, restrictions on contact between the abusive party and the children;
 - ♦ imposing formal or informal supervision of visitation, or of transfer/exchange; and
 - ♦ conditioning visitation rights on compliance with safety-related conditions; and
- offered recommendations that limit ongoing harassment or coercion.

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